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**Insights**

# LIABILITY WAIVERS RELATED TO COVID-19 IN THE UNITED STATES

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## I. COVID-19 Waivers.

Liability waivers can potentially be a very effective tool for avoiding personal injury lawsuits and potential liability in connection with COVID-19 damages. However, liability waivers for pandemics, and specifically for COVID-19 exposure, contraction, and/or spread, are new and have not been interpreted by the courts. Therefore, it is unknown the extent to which state courts will enforce waivers under the unprecedented circumstances presented by the pandemic. It is possible that COVID-19 waivers in some jurisdictions will be held to be against public policy. Courts examining liability waivers related to COVID-19 will be guided by established general principles of law, which generally enforce well-drafted, unambiguous waivers of liability. Therefore, waivers are recommended because they are easy to employ and if drafted properly, may well be enforced and avoid liability.

In order to have the best chance of being enforced, COVID-19 waivers should be drafted carefully to comply with the general provisions discussed below. State courts will evaluate waivers according to their own laws and principles so that the same waiver that is enforceable in one state may not be enforced in another. A separate release for COVID-19 is recommended to make the waiver conspicuous and obvious to the signer. COVID-19 waivers should be clear and unambiguous. They should specifically reference "negligence." They should not attempt to disclaim liability for recklessness or intentional acts. They should include a choice of law provision with some important connection to the event at issue or to the company or its contracting party. They should also be accompanied by good company conduct to the extent possible, including, among other things, establishing and following good standards of care specific to COVID-19, following CDC guidelines, following state and county health department guidelines and orders, providing remote options for customers if possible, and offering an opportunity for questions or information by the customer.

Our draft liability waiver is intended to be a starting point for maximizing the possibility of enforcement across the United States. It is recommended that companies analyze where the waiver will be signed, how it will be provided, and the exact nature of the events for which it will be used. Companies should consider whether it is possible to allow participants to attend virtually rather

than risk contracting COVID-19. Even if people are not likely to choose remote attendance, simply offering the choice can be helpful toward enforcement of a waiver. Companies should analyze the circumstances under which the waiver will be signed. An important consideration is the choice of law provision and selecting the most favorable law available with enough connection to the activity that the provision would be enforced. The attached form waiver is drafted based on known legal principles for likely enforcement, and is intended to be used as a starting point to be tailored based on specific circumstances, jurisdictional requirements, etc. We recommend that each company conduct a specific analysis of the best ways to limit the company's liability and tailor this waiver to the company's business and the relevant jurisdiction. Companies may also consider consulting for reference any endorsed or suggested waivers published in local practice guides. *See, e.g.,* 7 Mo. Prac., Legal Forms § 37:49 (3d ed.). Please see the disclaimer on our form waiver that enforcement cannot be guaranteed.

## II. Liability Waivers Are Enforceable in Most States.

In most states, courts will enforce liability waivers that insulate a party from liability arising out of that party's negligent conduct. For example, courts regularly enforce waivers for negligence claims arising from attendance and/or participation in certain events. *See, e.g.*, *Grabill v. Adams Cty. Fair & Racing Ass'n*, 666 N.W.2d 592 (Iowa 2003) (enforcing liability waiver for event promoter of an automobile race); *Rose v. Nat'l Tractor Pullers Ass'n, Inc.*, 33 F. Supp. 2d 757, 759 (W.D. Wis. 1998) (enforcing liability waiver for tractor pull competition); *Mero v. City Segway Tours of Washington DC, LLC*, 962 F. Supp. 2d 92 (D.D.C. 2013) (enforcing liability waiver for tour company).

States look to various factors to determine whether the waivers should be enforced. Commonly, states require that such waivers are clear and unambiguous and that they be fairly bargained for between the parties. *See* § 8 Williston on Contracts § 19:21 (4th ed.); *Mero*, 962 F. Supp. 2d at 100. Liability waivers are strictly construed *against* the party that drafted them. *Harris v. Walker*, 119 Ill. 2d 542, 548, 519 N.E.2d 917, 919 (Ill. 1988) ("exculpatory clauses are not favored and must be strictly construed against the benefitting party, particularly one who drafted the release."). Some states favor enforceability of waivers on the basis of freedom to contract, while others more strictly scrutinize liability waivers. *See BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714, 724–25, 80 A.3d 345, 351 (2013) ("[i]n the absence of legislation to the contrary, exculpatory clauses are generally valid, and the public policy of freedom of contract is best served by enforcing the provisions of the clause."), *c.f. Natchez Reg'l Med. Ctr. v. Quorum Health Res.*, LLC, 879 F. Supp. 2d 556, 562 (S.D. Miss. 2012) ("Clauses limiting liability are given rigid scrutiny by the courts.") (internal quotations omitted).

Three states—Virginia, Montana, and Louisiana—categorically refuse to enforce waivers of personal injury claims. *See Hiett v. Lake Barcroft Cmty. Ass'n, Inc.*, 244 Va. 191, 195 (1992); Mont. Stat. § 28-2-702; La. Civ. Code art. 2004. Additionally, Connecticut courts rarely uphold liability waivers in personal injury claims. *See Hanks v. Powder Ridge Rest. Corp.*, 276 Conn. 314, 885 A.2d 734 (2005) (liability waiver unenforceable for snow tubers who had no ability or right to control the activity).

Further, as a matter of public policy, some states will not enforce waivers signed by parents that seek to waive personal injury claims of minors. *See, e.g.*, *Hojnowski ex rel. Hojnowski v. Vans Skate Park*, 375 N.J. Super. 568, 583, 868 A.2d 1087, 1096 (App. Div. 2005) (invalidating parental waiver in suit against skateboard park).

**a. The Waiver Must Be Clear and Unambiguous.**

A fundamental requirement for enforceability of liability waivers is that they are drafted in a manner that guarantees customers understand the risks associated with the services, as well as the rights they intend to waive. *See* 8 Williston on Contracts § 19:21 (4th ed.) ("courts have increasingly examined exculpatory provisions and releases to ensure free and knowing assent to the terms they contain, and exculpatory provisions must clearly, unambiguously, and unmistakably inform the party relinquishing its rights of exactly what is being waived. Moreover, the form of the purported exculpatory agreement, viewed in its entirety, must signify its contractual nature and significance, so that a person of ordinary intelligence and understanding would realize its putative effect.").

Generally, this requires two criteria: "First, the waiver must clearly, unambiguously, and unmistakably inform the signer of what is being waived. Second, the form, looked at in its entirety, must alert the signer to the nature and significance of what is being waived." *See Rose v. Nat'l Tractor Pullers Ass'n*, Inc., 33 F. Supp. 2d 757, 764 (W.D. Wis. 1998). Many jurisdictions require the parties to specifically include the term "negligence" for a liability waiver to be enforceable. *See, e.g.*, *Bender v. CareGivers of Am., Inc.*, 42 So. 3d 893, 894 (Fla. Dist. Ct. App. 2010) (reversing grant of summary judgment for provider of home health aide services where release did not include the term "negligence" because "an exculpatory agreement must expressly include the term 'negligence'… to be clear and unequivocal.").

**b. No Waiver for Intentional, Reckless, or Grossly Negligent Conduct.**

Most states will not enforce waivers of liability for intentional, reckless, or grossly negligent conduct. Restatement (Second) of Contracts § 195 (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."); *Mero*, 962 F. Supp. 2d at 100 ("Because District of Columbia law prohibits release from liability for grossly negligent, reckless, or intentional acts, the Agreement will not be held to indemnify defendant with respect to such conduct.").

This means a party is not protected by a liability waiver to the extent it engaged intentionally or recklessly in conduct that caused the harm. For example, liability waivers do not immunize parties against allegations of fraud. *See generally Zuckerman-Vernon Corp. v. Rosen*, 361 So. 2d 804 (Fla. Dist. Ct. App. 1978). Similarly, conduct that is deemed to be grossly negligent—i.e. an extreme deviation from the ordinary standard of care or a conscious disregard for the rights

and safety of others—generally will not be protected by a liability waiver. *See Mero*, 962 F. Supp. 2d at 100.

**c. Waivers Contrary to Public Policy or Unconscionable Are Not Enforced.**

Even where liability waivers are clear and unambiguous, they may still be deemed contrary to public policy and therefore unenforceable:

A release or other exculpatory provision may be unenforceable as the result of public policy, as articulated either by the courts or by state or federal legislatures. This so-called public policy exception to the enforcement of exculpatory provisions is a common-law doctrine similar to but distinct from the doctrine that mandates strict scrutiny and potential invalidation of agreements affected with the public interest. Simply stated, and in its most basic form, the public policy exception provides that exculpatory provisions which violate public policy are at the very least unenforceable, and may be void in their entirety and therefore a legal nullity.

8 Williston on Contracts § 19:22 (4th ed.). Courts "closely examine whether [exculpatory] agreements violate public policy and construe them strictly against the party seeking to rely on them" because exculpatory agreements "tend to allow conduct below the acceptable standard of care." *See Rose*, 33 F. Supp. 2d at 763.

The seminal case regarding the public policy rule is *Tunkl v. Regents of the University of California*, 60 Cal. 2d at 98-101, which courts across the country routinely cite for their application of the rule. In *Tunkl*, the court concluded that exculpatory agreements violate public policy if they affect the public interest adversely; *id.* at 96–98, 32 Cal.Rptr. 33, 383 P.2d 441; and identified six factors (Tunkl factors) relevant to this determination:

> [1] [The agreement] concerns a business of a type generally thought suitable for public regulation.
>
> [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
>
> [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
>
> [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
>
> [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

> [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

*Id.*, at 98–101, 32 Cal.Rptr. 33, 383 P.2d 441.

In some states, waivers may implicate public policy when they involve a matter of interest to the public, like employment contracts or public services. *See* Restatement (Second) of Contracts § 195 (1981) ("A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if: (a) the term exempts an employer from liability to an employee for injury in the course of his employment; (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty." For example, many states find that waivers purporting to release an employer from liability for negligence to its employees violates public policy because workplace safety is regulated and employers have superior bargaining power so waivers are considered inherently unfair. *See, e.g.*, *Brown v. Soh*, 280 Conn. 494, 503 (2006).

## III. Choice of Law.

There is no universal rule regarding what state's law will apply to interpret a liability waiver signed between parties of different states. Generally, the law of the forum state will supply the framework for the choice-of-law analysis. *See Wright v. Sony Pictures Entm't, Inc.*, 394 F. Supp. 2d 27, 31 (D.D.C. 2005) ("The forum state's choice of law rules apply in a diversity action."); *Thea v. Kleinhandler*, 807 F.3d 492, 497 (2d Cir. 2015) ("Where jurisdiction is predicated on diversity of citizenship, a federal court must apply the choice-of-law rules of the forum state." (citations omitted)).

### a. Many States Adopt the Restatement (Second) of Conflict of Laws.

While the choice-of-law analysis will depend on the state where suit is brought, many states have adopted the Restatement (Second) of Conflict of Laws (the "Restatement") for choice-of-law questions in contract matters. *See, e.g.*, *Kearney v. Okemo Ltd. Liab. Co.*, No. 5:15-CV-00166, 2016 WL 4257459, at *3 (D. Vt. Aug. 11, 2016) (applying Restatement to interpret liability waiver for suit brought in Vermont); *Wright*, 394 F. Supp. 2d at 32 (applying Restatement to interpret liability waiver for suit brought in District of Columbia).

Where the liability waiver is silent on the law that governs, the Restatement looks to the state with the most significant relationship to the transaction and the parties:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189- 199 and 203.

Restatement (Second) of Conflict of Laws § 188 (1971); *Wright*, 394 F. Supp. 2d at 32 (applying Restatement to hold that law of D.C., not Virgina, where the contract was negotiated, signed, and substantially performed in D.C. and where D.C. had the greatest interest in resolving the issue).

Where the liability waiver specifies that the contract will be governed by a particular state's law, the Restatement applies the following analysis:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188,3 would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

*See* Restatement (Second) of Conflict of Laws § 187 (1971). Even if the waiver specifies application of a specific state's law, the court may apply a different state's law. *Kearney*, 2016 WL 4257459, at *4 (applying Restatement to hold that Vermont law governed liability waiver, despite the parties' agreement that Colorado law governed, where Colorado had no substantial relationship to the parties or the transaction and where the public policy of Vermont prohibited the type of liability waiver at issue, which would otherwise have been upheld under Colorado law).

**b. Some States Apply the Law of the State Where the Contract Was Executed (*Lex Loci Contractus*).**

Some states follow the rule of *lex loci contractus*, and apply the law of the place where the contract was executed. *See Coulter v. ADT Sec. Servs.*, 744 F. App'x 615, 618 (11th Cir. 2018) (Under Florida law, "matters bearing on the validity and substantive obligations of contracts are determined by the law of the place where the contract is made (lex loci contractus)."); *Blackwell v. Sky High Sports Nashville Operations*, LLC, 523 S.W.3d 624, 633 (Tenn. Ct. App. 2017) (applying the law of Tennessee to interpretation of liability waiver because contract was executed in Tennessee, and rejecting waiver's language which chose California law).

## IV. Conclusion

While Courts have not yet interpreted liability waivers that disclaim liability for COVID-19 exposure, organizations seeking to protect themselves from COVID-19-related liability should be guided by general principles surrounding liability waivers. These general principles suggest that a liability waiver will be enforced with respect to negligence claims if the waiver is 1) clear and unambiguous; and 2) does not violate public policy. Given the variation between states and the fact-intensive nature of the analysis, each company should consider its specific business activities including the applicable jurisdictions and tailor its waiver to attempt to maximize enforcement.

View draft liability waiver here.

## RELATED PRACTICE AREAS

- Mass Torts & Product Liability

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