

COVID-19 LIABILITY WAIVERS

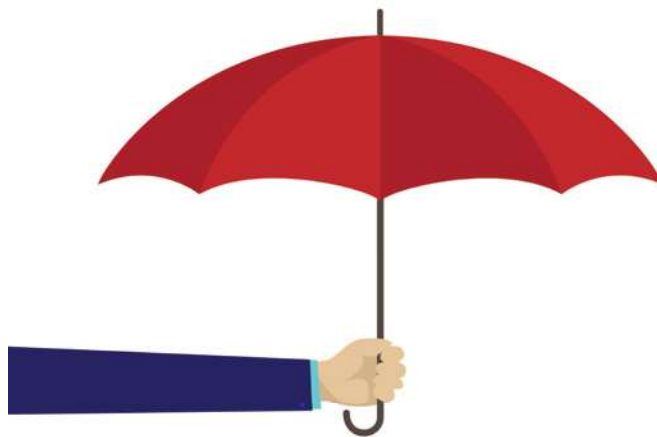


Part of the New Workplace Normal?

This article is a condensed version of a white paper produced by Goldberg Segalla LLP's COVID-19 Task Force.

As has been widely reported, to register online for the Donald J. Trump for President Rally in Tulsa, Oklahoma, you must agree that: “By attending the Rally, you and any guests voluntarily assume all risks related to exposure to COVID-19 and agree not to hold Donald J. Trump for President, Inc.; BOK Center; ASM Global; or any of their affiliates, directors, officers, employees, agents, contractors, or volunteers liable for any illness or injury.” This is a handy, if particularly high-profile, example of a time-honored approach to managing business risk: have your customers check their right to sue at the door. But, never before have we seen this risk management approach associated with a pandemic.

Exculpatory clauses with similar COVID-19 language (call them what you will: waivers, disclaimers, releases, acknowledgements) have become increasingly common. In fact, their widespread use may soon make COVID-19 disclaimers unsurprising and largely overlooked, like so much other fine print we encounter day to day. And yet, on their face, COVID-19 disclaimers seem different than anything we have seen before. Certainly, this is not like agreeing to refrain from diving into the Kiddie Pool, or from pumping gas during a lightning storm, or from suing if you crash your go-cart. Instead, COVID-19 disclaimers are agreements to accept a little-understood, potentially lethal threat, for the benefit of doing something otherwise safe, like dancing, or watching a movie, or eating burritos in public.



So, the question is: Do COVID-19 related exculpatory clauses serve a purpose. Should your business use them? What protection do they really offer? Will they hold up?

Exculpatory devices for the consumer public vary by jurisdiction and industry. Most states have specific statutory regulations for their use, such as at ski resorts and amusement parks. Until quite recently, exculpatory devices mostly appeared on the back of event tickets (or “click-wrap” agreement on the event’s ticketing website), or they were handed to you by a medical receptionist, or sat on a clipboard next to the cash register at a shooting range. Today, however, they are commonly encountered everywhere from barbershops to libraries. Why not showroom floors?



Waiver of Liability

This agreement releases **{Organization}** from all liability relating to injuries that may occur **{during activity, on location, etc.}**. By signing this agreement, I agree to hold **{Organization}** entirely free from any liability, including financial responsibility for injuries incurred, regardless of whether injuries are caused by negligence.

I also acknowledge the risks involved in **{type of activity}**. These include, but are not limited to **{list risks}**. I swear that I am participating voluntarily, and that all risks have been made clear to me. Additionally, I do not have any conditions that will increase my risk of experiencing injuries while engaging in this activity.

By signing below I forfeit all right to bring a suit against **{Organization}** for any reason. In return, I will receive **{participation in activity}**. I will also make every effort to obey safety precautions as listed in writing and as explained to me verbally. I will ask for clarification when needed.

I, _____, fully understand and agree to the above terms.

ENFORCEABILITY ISSUES WITH RELEASES

Whether or not the customer actually reads the exculpatory language, these clauses certainly can be effective and enforceable. However, being so-called contracts of adhesion (i.e. one-sided and non-negotiable), courts closely scrutinize them. Is the clause conspicuous and clear? Is it ambiguous? These are key factors in determining enforceability. A well-drafted event exculpatory device will use plain English and avoid legalese. Additionally, most states only allow exculpatory devices for negligent behavior, while risks from wanton, willful, malicious, or criminal acts cannot be released. (Many states will not allow minors, or the parents of minors, to enter into exculpatory agreements, and liability for events open to the public, especially those that cater to children or families, often cannot be limited.)

ENFORCEABILITY WILL HINGE ON THE LANGUAGE OF THE DOCUMENT AND THE JURISDICTION

While the long-familiar language of exculpatory agreements will likely carry forward to many of the new COVID-19-centric forms, its legal effect might differ. The ease of COVID-19 transmission combined with its lethality make it a totally unique risk. Is the law willing to conscience serious illness or fatalities arising from a tire kick at the local minivan dealer that had a sneezing employee but also had exculpatory language at its public entrance?

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CLARITY AND SPECIFICITY ARE KEY

Also, promoting common sense and situational awareness—like on a ski slope where conditions constantly change, and where one must keep



an eye out for the actions of others—may improve the odds of exculpation. Best to blend candor and sincerity (e.g., “despite diligent hygiene measures and compliance with the law we cannot guarantee that infectious transmission will not occur” and “be sure to maintain social distancing at all times while on our premises”) with tried and true legal verbiage in an effort to craft an enforceable COVID-19 waiver.

There is no one-size-fits-all liability release template that can be used across all jurisdictions and by all businesses. Because each state has its own approach to liability waivers, businesses are well advised to consider and fully comply with local laws, which, as we all know, change with some regularity concerning the ongoing pandemic response.

With all of that said, even assuming your operation follows all federal, state, and local laws and guidance, a plaintiff could argue that allowing the public to visit a semi-crowded showroom, or service department,

or to serially enter vehicles on display during the pandemic in itself is grossly negligent or reckless (a risk from which there is likely no reprieve, regardless of the language of your waiver form) despite any precautions taken. In fact, these very precautions (e.g. fogging and other heavy-duty disinfecting) could be a potential source of irritation or illness.

But even so, the industry must find a way forward to reengage with consumers in a live setting. Being forthcoming about the situation and asking your customers

to move ahead with you on this new frontier seems to be the best approach. In effect, you promise that you are doing all that you can to make your premises safe, and you simply ask your customers to acknowledge this risk in exchange for the privilege of doing business with you.

This all might seem fussy and legalistic (it is both of these) and just plain no fun (again, correct). However, times have changed. Going forward, consumers will demonstrate a surprisingly

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respectful attitude toward caution of all kinds in the face of a threat to everything we hold near and dear.

LOOKING AHEAD: EXCULPATORY CLAUSES LIKELY TO PLAY CENTRAL ROLE IN COVID-19 LIABILITY BATTLES

The first claims alleging negligent or reckless transmission of COVID-19 have already been filed, and it would be hard to overstate how many more such claims are expected. To be sure, exculpatory clauses are likely to be found at the center of this legal tempest. Whether or not an exculpatory clause is ultimately upheld in any given circumstance may be impossible to predict, but any business owner would do well to put this risk mitigation strategy in play, in concert with a serious and sincere commitment to hygiene.

For more information on COVID-19 liability waivers or for immediate guidance, contact COVID19TaskForce@goldbergsegalla.com.



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management, and likely claims scenarios in the context of the pandemic.



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