



September 22, 2020

TO: District Superintendents

FROM: Robert J. Kretzmer, Director
Property & Liability Division

SUBJECT: Waivers and COVID-19

Since the beginning of the COVID-19 pandemic, a significant amount of time and effort has been expended on whether or not the use of waivers is appropriate for SISC member districts. For a good review of the implications of the use of waivers, we recommend districts review an article published in the August 2020 CLM (Claims and Litigation Management) magazine entitled *Liability Waivers in the COVID-19 Age* by Chantal M. Roberts, CPCU, AIC. The following summarizes some key points from the article that could be applicable to school environments:

A liability waiver is intended to release the school district for any fault or liability for injuries resulting from ordinary negligence. Assumption of Risk forms are typically used when the participant knows the risks associated with the activity, but elects to participate regardless. Oftentimes Assumption of Risk forms are used when the activity is known to involve inherent risks. Pre-injury waivers operate similarly and attempt to release the district before the activity begins. Hold harmless agreements release the school district from responsibility for injury occurring from an activity. These type of agreements usually come with indemnification clauses.

Liability waivers oftentimes are requested by our districts and may serve as a type of “security blanket” as pointed out in the above-noted article. However, there are challenges to the creation of these waivers. The courts have repeatedly stated that the waivers must specifically state the intention of the parties, be clear and unambiguous, and understand the risks associated with the rights being waived. Any ambiguity in the waiver will lead to the waiver being construed against the author. In addition, waivers must not be against public policy. Questions remain as to the enforceability of liability waivers used by school districts and other entities in the age of COVID-19. Proponents of waivers believe they should be enforceable if a school district (for example) is following the guidelines issued by the Centers for Disease Control (CDC).

A very key point, as pointed out by the author of the article, is that a waiver is enforceable only as to the individual who attended the event, or in our case, the volunteer at the school site, for example. The protections in the waiver would not extend to other third parties that the signer of the waiver may come in contact with after he or she had been exposed to the virus.

SISC continues to recommend that our member districts work with their legal counsel in the event the use of a liability waiver is contemplated as schools begin the reopening process. This memo is intended to provide food for thought as to some of the considerations that must be taken when developing a liability waiver for use by your school district.

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P.O. Box 1847, Bakersfield, CA 93303-1847
2000 K St • Larry E. Reider Education Center, Bakersfield, CA 93301
ph: 661.636.4710 fx: 661.636.4156 • sisc.kern.org

A Joint Powers Authority administered by the Kern County Superintendent of Schools Office, Mary C. Barlow, Superintendent

Liability Waivers *in the* COVID-19 AGE

Why These Security Blankets Aren't
Always What They're Cracked Up to Be
By Chantal Roberts

Many businesses, schools, and event centers use waivers and hold-harmless agreements as a type of security blanket or an extra layer of protection from injury claims. In the COVID-19 age, these same locales still want the security of a waiver or a hold-harmless agreement; however, as many claims professionals know, waivers may not always be enforceable.

For example, prior to President Trump's Tulsa rally on June 20, 2020, the event's registration page had the following waiver language participant hopefuls were required to click in order to obtain a ticket:

By clicking "register" below, you are acknowledging that an inherent risk of exposure to COVID-19 exists in any public place where people are present. By attending the [r]ally, 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.

While this language may be a comfort blanket for the campaign and event organizers, it also demonstrates how many waivers do not meet the requirements that must be satisfied to be enforceable in Oklahoma and other locales.

TYPES OF SECURITY BLANKETS

A liability waiver is a document in which a participant agrees to release the provider of an event for any fault or liability for injuries resulting from ordinary negligence.

Assumption of risk is often used by claims professionals when denying a claim involving a claimant who has been injured. This refers to situations in which an individual knew the risks associated with an activity, but chose to participate regardless. Assumption of risk is an affirmative defense for the insured because the thinking is that some activities are inherently dangerous or lend themselves to injury. For example, drivers in bumper cars assume the risk they will be hit by other drivers and may suffer whiplash as an effect of this activity.

Another type of waiver is one that many parents are familiar with: the pre-injury waiver. This document releases the provider from injury claims before the activity begins. Usually, parents will endorse this before signing their child up for a sports team or field trip.

A hold-harmless agreement is another example of a common waiver in which the participant agrees to release the provider from any responsibility for injury occurring from an activity. Black's Law Dictionary Free Online Legal Dictionary (2nd Ed.) says "hold harmless" means a person is excused from

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her obligation and liability. The hold-harmless agreement is often paired with an indemnity agreement; Black's Law Dictionary defines "indemnity" to mean to hold harmless and to reimburse. So a person signing this type of security blanket agrees to reimburse the activity provider as well as to release the provider from its liability.

While there are other types of waivers, the last to be discussed here is the one used by President Trump and many other event centers: the ticket or receipt waiver. Most people are familiar with this waiver because it appears on the back of most sports tickets, or, in the case of President Trump's rally, a user is required to click on the acknowledgement-of-release language when requesting a ticket online.

PSYCHOLOGY OF SECURITY BLANKETS

Much like actual security blankets relieve stress and anxiety for children in situations that worry or frighten them, waivers are meant to operate in the same fashion. However, these comfort

objects cannot completely allay a child's worries, and neither can waivers for insureds and insurers.

By including waivers prominently and requiring users to sign or acknowledge them in order to participate, providers hope that claimants will think twice about filing a claim or a lawsuit. Not all waivers are created equally, though, and courts have stated that the language in a waiver must have the following standards:

- Specifically state the intention of the parties.
- Be clear and unambiguous.
- Customers must be able to understand the risks associated with the rights they are waiving associated with the service provided.

Some states, such as New York, require the word "negligence" to be specifically included and to define what the activity provider's negligence would be. When there is ambiguity, it's important to understand that the language of a waiver will be construed

strictly against its author, in much the same way that an insurance policy is construed against the insurer when policy terms are unclear.

Therefore, a waiver for COVID-19 should clearly illustrate the potential risks of coronavirus exposure even after preventative measures like masks, washing and sanitizing hands, and social distancing are taken; expressly state that the client understands and is willing to accept the risks of contracting the virus; and have the participant expressly agree to release the provider from any negligence claims in relation to COVID-19.

WHEN WAIVERS WORK— AND WHEN THEY DON'T

The general rule is that waivers are valid and enforceable, but there are times when a waiver simply will not work.

Waivers must not be contrary to public policy, and despite the flurry of legislation in states and in Congress to create a safe harbor for businesses and nonprofits, it is currently unknown if a waiver that releases a business from

How Contact Tracing Can Help

As defense counsel and insurers prepare to handle COVID-19-related claims, they also have to be cognizant of welcoming their own employees back into the workplace. Gallagher Bassett recently took the innovative step of dedicating many of their experienced workers' compensation professionals as contact tracers. Here, CEO Mike Hessling and Vice President of Carrier Practice Caryn Siebert explain what contact tracing is and how it can be used when a team member becomes symptomatic or diagnosed with COVID-19.

"Contact tracing involves identifying and notifying anyone who had close contact with someone infected with COVID-19," says Hessling. "In doing so, it limits downstream costs related to lost productivity, health care, and potential workers' compensation claims. Additionally, it allows a company to resume and maintain 'normal' operations, rather than requiring quarantine for all staff in a location after a COVID-19 diagnosis occurs. Most importantly, a contact tracing program signals to employees that the carrier or firm is committed to its employees' physical and psychological health and safety."

When evaluating contact tracing solutions, Siebert says to ask the following questions:



ARE THE CONTACT TRACERS:

- Professionally trained on CDC best practices?
- Empathetic, able to establish trust, and resourceful in locating patients, contacts, and those reluctant to engage in conversation?
- Utilizing robust scripts and systems to capture information timely, limiting the need for recurring employee touchpoints?

DO THE CONTACT TRACERS WORKING FOR ME:

- Understand and respect patient confidentiality?
- Understand medical terms and principles of exposure, infection, infectious periods, potentially infectious interactions, symptoms of disease, and pre-symptomatic and asymptomatic infections?
- Have the data and reporting necessary to confidently inform executive management on the health and productivity of the workforce?

"In spite of a company or firm's best laid plans, it's a matter of when, not if, a team member becomes symptomatic or positively diagnosed with COVID-19," says Hessling. "How you and your organization respond will be critical to instilling confidence in your employees and ensuring 'return to work' doesn't rapidly dictate another mass 'return to home.'"

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the risks associated with contracting COVID-19 is enforceable. Ever since businesses contemplated reopening in the COVID-19 era, they have been wondering about their liability amidst an uptick in COVID-19-related lawsuits.

Some customer-facing businesses, such as salons and gyms, are requiring employees to sign waivers due to the fear that they can be targeted for liability and negligence lawsuits. If employees are sickened by COVID-19, they generally cannot waive their workers' compensation benefits. Workers' compensation policies are the employees' exclusive remedy against the employer for occupational injuries occurring out of the course and scope of the job. Even if the employees attempted to plead negligence in a suit against the business, a waiver may not stand the court's scrutiny.

Waivers cannot apply to gross negligence, or willful or intentional conduct. The Occupational Safety and Health Administration (OSHA) mandates that employers provide a safe and healthy work environment. If businesses force employees to sign a waiver before coming to work, then the waiver could be viewed as a way for businesses to circumvent their duties.

According to the American Tort Reform Association, 13 states and the District of Columbia passed COVID-19 laws to limit the liability of health care providers and businesses. Governors of 23 states have issued executive orders limiting the liability of health care providers and some businesses. There is concern that these orders and laws may be unconstitutional. Tennessee has been unable to pass a bill protecting businesses and schools because the legislature wants the bill to be back-dated to March, but Tennessee's Constitution says that a law cannot be retroactively enforced when it impairs the obligations of contracts.

Additionally, schools are worried about choosing when and how to reopen. Many states do not recognize parental waivers; in other words, waivers signed by parents for their children are not enforceable. Recently,

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however, courts have begun to enforce these waivers, and Alaska, Colorado, Florida, and North Carolina have passed statutes enabling the enforcement of the parental releases. That means a school could be held responsible if a child became sick due to the coronavirus. Maintaining physical distancing in already overcrowded school rooms will be difficult for most children and school districts. Proponents of the liability limitations argue that businesses and schools will not receive legal protections if the entities do not follow the Centers for Disease Control and Prevention's (CDC) guidelines for cleaning.

HANDLING THE WAIVERS

Businesses are experiencing stress and insecurities while reopening during COVID-19, which makes it understandable as to why they would want a security blanket in the form of a waiver. To ensure waivers are enforceable, it's important that they are tailor-made for the business, and as such, an attorney should review it. A waiver should include easy-to-understand language and explicitly state what rights the customer is giving up in exchange for the service provided. Posting at the door or inside a business does not constitute a waiver for the customer.

Each state interprets waivers differently, and Oklahoma considers waivers valid if there is clear and unambiguous language, and the event would not cause injury to the public health. However, COVID-19 is a known

public health hazard. If President Trump's campaign believes that a waiver will protect it from negligence, then its security blanket may have a loose thread. That's because when an attendee clicked to order a ticket and thereby "signed" a waiver, the waiver only applies to the person attending the event. So while attendees who can prove they were infected with COVID-19 during the rally may not be able to file suit against the campaign for the June 20, 2020, event, family members of attendees who were infected could file a claim or suit against the campaign for the rally organizers' negligence.

Adjusters, when receiving the suit or claim from the insured or claimant, need to review the waiver in addition to state laws regarding same. Like any other claim, a full investigation should be carried out, including recorded statements of the claimant, the insured, and any witnesses regarding the adherence to the CDC's guidelines for physical distancing and cleaning. Proving the claimant contracted the virus from the insured's location will be difficult; so, understanding the movements of the claimant—called contact tracing—will be important. [See sidebar, "How Contact Tracing Can Help."]

Unfortunately, waivers concerning the pandemic are new because the courts are not yet equipped to answer the questions posed. Courts may refuse to enforce waivers if a business' actions were against public policy. Currently, Connecticut, Louisiana, Montana, and Virginia refuse to enforce waivers. Arizona holds that the validity of an assumption of risk is a fact question for the jury and has a strict standard that must be observed for a waiver to be effective.

Liability waivers are usually used to protect businesses from liability for an intrinsically risky leisure activity. In today's era, though, going to the gym or to the grocery store can make even grown adults reach for their security blankets. ■

Chantal M. Roberts, CPCU, AIC, is president of CMR Consulting and an expert witness for claims standards, procedures, and practices. cmroberts@cmrconsulting.net