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COVID-19 Liability Waivers: What Businesses Should Know

By Marc Lamber

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Law360 (June 24, 2020, 5:38 PM EDT) — After weeks of mandatory lockdown to help slow the spread of COVID-19, businesses across the country are re-opening their doors to customers. Many of these businesses are grappling with the risk that customers may contract COVID-19 on business premises, and may try to hold the business liable for the resulting damages.

One option a business may take to help minimize this risk is to require customers to contractually waive their right to hold the business liable if they contract COVID-19 on premises. Although requiring customers to sign a COVID-19 liability waiver may help insulate a business from liability, the enforceability of COVID-19 liability waivers presents legal uncertainties, as courts have not yet analyzed such waivers in any detail.

Additionally, any business contemplating requiring a COVID-19 liability waiver runs the risk that it might alienate customers who view the waiver as an indication that the business is not maintaining a safe and/or sanitary environment, or otherwise cause the customers to patronize a competing business that does not require such a waiver.

Although consumers regularly sign liability waivers when they engage in inherently dangerous activity on a commercial property, like exercising at gym or going skiing, most consumers have never been asked to sign a liability waiver before going shopping, going out to dinner or getting a haircut. It is unclear how consumers will respond to COVID-19 liability waivers, especially in the context of more mundane commercial industries where liability waivers have not traditionally been utilized.

What are the features of enforceable liability waivers?

Not all states view liability waivers the same, as liability waivers are creatures of contract law and state public policy. Courts in different states will inevitably interpret COVID-19 liability waivers against the backdrop of the respective state laws regarding liability waivers and contracts generally.

Therefore, a COVID-19 liability waiver should be drafted to conform with the specific laws of the state that will govern the waiver. The issue of which state's law applies can become complex when, for example, a business operating in State A wants to employ a COVID-19 liability waiver in a contract that will be governed by the laws of State B.

Businesses should always have a licensed attorney review any choice-of-law provision to determine how it would be viewed by a court in a particular situation. The following discussion focuses on majority trends in the laws regarding liability waivers.

Generally, liability waivers are disfavored,[1] and will be construed against the drafting party. To be enforceable, a liability waiver must be clear and unambiguous.[2]

It cannot be riddled with complex legal terms or buried deep in the fine print of a larger contract – it must clearly state the particular rights being waived by the customer. Even if a liability waiver checks all the legal boxes in terms of clarity, specificity, etc., most courts will not enforce waivers that relieve the drafting party of liability for grossly negligent, reckless or intentionally tortious conduct.[3]

Similarly, even if it is clear and unambiguous, a court may still find a liability waiver unenforceable if it violates the respective state's public policy, which is developed in the common law but also periodically expounded in statutory law. An example of a liability waiver that may violate public policy is one that attempts to release an employer from all liability to its employees.[4]

Can customers make revisions to COVID-19 liability waivers or refuse to sign them?

For most businesses, a customer's only options when presented with a COVID-19 liability waiver will be to sign it or be denied service. Businesses regularly present liability waivers in a take-it-or-leave-it manner – sometimes referred to as adhesion contracts.

This is because it is often impractical to negotiate different contract terms for every customer. For most businesses, it will be too difficult to negotiate each individual COVID-19 liability waiver, so customers will have no ability to negotiate or make revisions to a waiver's terms.

Adhesion contracts are enforceable in most states, but the customer's opportunity to bargain and make revisions to a liability waiver can be an important factor in determining a waiver's enforceability if the waiver is flawed in other respects.[5] Some courts find adhesion contracts unenforceable when they are unconscionable – that is, when they are wholly or fundamentally unfair to the nondrafting party who had no real bargaining power.[6]

Other courts may not even find that a take-it-or-leave-it contract is an adhesion contract unless the contract is unconscionable.[7] Regardless of how it is labeled, courts will probably be more inclined to find a take-it-or-leave-it COVID-19 liability waiver unenforceable when it is broad and involves an essential business, because customers will most likely feel that they have no option but to sign it as drafted.[8] Walking away might be less of an option with such businesses.

Customers can refuse to sign a COVID-19 liability waiver, but anyone who refuses to sign a COVID-19 waiver can be refused service and prevented from entering the business premises. This will be more complicated for businesses like gyms, which will likely have existing contractual relationships with their customers.

These businesses should be prepared for customers who prefer to terminate the contractual relationship rather than agree to waive liability going forward. In these instances, the terms of the existing contract will dictate the consequences of the termination, which may warrant a prorated refund of membership dues or fees already paid.

Will COVID-19 liability waivers signed by or on behalf of minors be enforceable?**Liability Waivers Executed by Minors**

The general rule in most states is that a minor lacks the capacity to contract – meaning any contract or liability waiver signed by a minor is voidable until the minor reaches the age of majority.

If the minor does not revoke consent to the contract upon reaching the age of majority, a court may deem the liability waiver enforceable. States do, however, generally allow a minor to contract for necessities – i.e., medical care, shelter and food.[9]

Many businesses contemplating requiring customers to sign COVID-19 liability waivers will be providing nonresidential services or products that would not qualify as necessities. For these businesses, a COVID-19 liability waiver signed by a minor would likely be unenforceable if the minor successfully revokes consent to contract by subsequently bringing a claim for damages against the business.

Liability Waivers Executed by a Parent or Guardian on Behalf of a Minor

Most states do not enforce liability waivers signed by parents or guardians on behalf of their minor children.[10] However, some states recognize an exception to this rule when the liability waiver signed by the parent relates to a noncommercial school or municipal program, or voluntary extracurricular program.[11]

Courts uphold these liability waivers signed by parents out of recognition that important programs might become unavailable if the schools and/or municipalities are not provided with such protection from liability. In the context of COVID-19 liability waivers signed by parents or guardians on behalf of their minor children, courts will have to weigh the competing public policy considerations.

What are some guidelines for businesses drafting COVID-19 liability waivers?

Whether a business is implementing a standalone COVID-19 liability waiver (recommended) or incorporating COVID-19 language into a broader contract, businesses and attorneys should keep in mind the following drafting guidelines:

- All COVID-19 liability waivers should be drafted in clear language that is understandable to the ordinary person, and these provisions should be very conspicuous if included within a larger contract.

• Waivers should include language regarding the highly contagious nature of COVID-19 and warn that even with heightened cleaning procedures, social distancing, face masks, etc., the business cannot fully eliminate the risk that customers may contract COVID-19. They should be drafted so that customers agree that (1) they understand this heightened risk, and (2) with this understanding, they agree not to hold the business liable for any damages resulting from contraction of COVID-19 due to the business's negligence. Again, most courts will not enforce waivers that attempt to waive liability for gross negligence, recklessness or intentional tortious conduct.

• Waivers should comply with the applicable state laws and public policies regarding traditional liability waivers. If using a choice-of-law provision, drafters should ensure that the state whose laws will govern the contract has a significant connection to the parties and/or subject of the contract.

Businesses implementing mandatory COVID-19 liability waivers should also keep the following considerations in mind:

- Even businesses with COVID-19 liability waivers should strive to comply with all applicable federal, state and local recommendations for practices that can help lower the risk of COVID-19 transmission in the respective industry. If a court determines that deviance from such guidelines is grossly negligent or reckless, a COVID-19 liability waiver may not protect the business from being liable for a customer's resulting damages.

• Some businesses that have existing contractual relationships with their customers may believe the terms of their existing liability waiver are broad enough to cover contraction of COVID-19. However, given that liability waivers are typically construed against the drafting party, businesses should update existing waivers to include very specific COVID-19 language so that customers will have a more difficult time proving they were unaware of the rights they were giving up at the time they signed the waiver.

• With respect to minor customers, any waiver's enforceability will be fact and state specific. Both the nature of the services/products provided by the business (necessaries versus non-essential services/products) and who signs the contract (minor or parent/guardian) will be important factors, but each state can weigh these factors differently.

Conclusion

Businesses across the country are already implementing mandatory COVID-19 liability waivers, and many more are likely to follow suit. But COVID-19 liability waivers will not shield against liability for grossly negligent, reckless or intentionally tortious business conduct.

In addition, such waivers may not be enforceable against minors, even if signed by the parent. Furthermore, a business will need to consider the risk that any waiver will alienate a potential customer. Nevertheless, liability waivers are an easy, inexpensive option to potentially deter lawsuits and limit liability related to COVID-19 transmission at business premises.

Businesses considering a COVID-19 liability waiver should make sure that the waiver clearly sets forth the risks of COVID-19 transmission, and clearly identifies the rights that customers are giving up by signing it. Although courts have not yet analyzed COVID-19 liability waivers in any detail, businesses should have these waivers reviewed by a licensed attorney to determine whether they comply with applicable state laws and public policies regarding liability waivers in general.

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[1] See Williston on Contracts § 19.21 (4th ed.) ("Contract provisions releasing or limiting liability for claims that have not yet arisen are generally not favored").

[2] See Williston on Contracts § 19.21 (4th ed.) ("[E]xculpatory provisions must clearly, unambiguously, and unmistakably inform the party relinquishing its rights of exactly what is being waived").

[3] Restatement (Second) of Contracts § 195 ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"); see also B Williston on Contracts § 19.21 (4th ed.).

[4] See *Brown v. Soh*, 909 A.3d 43, 48 (Md. 2006) ("[E]xculpatory agreements are 'almost universally rejected in the employment context, where exculpatory agreements exempting an employer from all liability for negligence toward his employees [are] void as against public policy'") (second [in insertion] in original).

[5] See *Brooten v. Hickie*, 348 Wis.2d 251, 258 ¶ 9 (Cir. App. 2013) ("The absence of an opportunity to bargain in regard to a waiver on contracts is a 'significant factor' suggesting a violation of public policy") (finding a liability waiver unenforceable when it was presented on a take-it-or-leave-it basis, was impermissibly broad and all-inclusive, and would have been unclear and ambiguous to an ordinary citizen).

[6] See, e.g., *Shipway v. United Airlines Inc.*, 28 F.Supp.2d 740, 755 (E.D. Tenn. 2004) ("A contract is not rendered unenforceable solely by virtue of it being an adhesion contract; rather, 'enforceability' generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable") (citations omitted).

[7] See, e.g., *Klos v. Lotricco*, 133 F.3d 164, 168 (2d Cir. 1997) ("A court will find adhesion only when the party seeking to rescind the contract establishes that the other party used 'high pressure tactics' or 'deceptive language,' or that the contract is 'unconscionable'") (citations omitted).

[8] Cf. *Broemer v. Abortion Servs. of Phoenix Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992) (en banc) (finding an arbitration agreement an unenforceable adhesion contract when it related to medical care, was presented to the plaintiff as a condition of treatment, and was beyond the plaintiff's expectations).

[9] See, e.g., *Schmidt v. Prince George's Hosp.*, 784 A.2d 1112, 1122 (Md. 2001) ("Contracts entered into by minors for non-necessaries ... are [...] voidable.... Notwithstanding this, a minor can be held to a contract for necessities under certain circumstances").

[10] *Galloway v. State*, 790 N.W.2d 252, 256 (Iowa 2010) (listing jurisdictions that do not enforce a parent's prenuptial waiver of their child's cause of action).

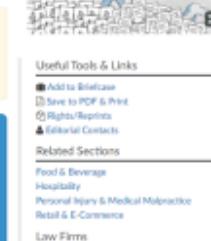
[11] See *Kelly v. U.S.*, 809 F.Supp.2d 429, 435 (E.D.N.C. 2011) ("Although the majority rule is that parents may not bind their children to pre-injury liability waivers, many states recognize an exception where the liability waiver is in the context of non-profit activities sponsored by schools, volunteers, or community organizations") (enforcing parent's waiver of daughter's right to hold the United States Marine Corp liable for injuries she sustained during her involvement in an after-school training program); see also *Shoren v. City of Newton*, 769 N.E.2d 738, 746-47 (Mass. 2002) (enforcing parent's waiver of daughter's right to hold school liable for injuries daughter sustained during cheerleading program).

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