



Can Employers Use COVID-19 Waivers To Limit Liability?

Insights

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With employees returning to work and companies reopening their doors to customers, employers are looking for ways to limit liability related to potential COVID-19 cases contracted in the workplace. To do so, many are considering waivers for not only their employees, but also for customers. Such waivers, however, are somewhat limited in their effectiveness and employers should consider the pros and cons before attempting to implement them. You may also want to consider an alternate strategy that may offer you some of the assurances you seek without many of the negatives associated with waivers.

No waiver or other attempt at limiting liability can replace the need to maintain a safe workplace. You should start by ensuring you are in strict compliance with local orders, state regulations, and guidance from government agencies like the Centers for Disease Control and Prevention (CDC), Occupational Safety and Health Administration (OSHA), Equal Employment Opportunity Commission (EEOC), and local health authorities.

What Are Waivers?

The term waiver has more than one meaning. In this context, employers may look to a waiver and releases of liability agreement consisting of a series of contractual provisions to mitigate certain risks of liability. Such an agreement not only includes a waiver clause, but also includes additional protective provisions like clauses for assumption of risks, covenants not to sue, and identification. If enforceable, they would eliminate liability for the risks discussed within.

Employee Waivers

Waiver agreements between employers and employees are traditionally disfavored due to the unequal bargaining power between them, as employers typically have superior bargaining power. In most states, such waivers do not apply to gross negligence or willful, intentional, or wanton conduct, as employers cannot waive such liability.

Employee waivers are even further limited due to workers' compensation statutes, where states generally require medical expenses, lost wages, and rehabilitation costs be provided to employees injured in the course and scope of their employment. For work-related injuries, employees generally cannot waive their worker's compensation claims. Although it may be difficult for employees to prove they contracted COVID-19 at work, some states (like [California](#)) have created a rebuttable presumption that workers who contract COVID-19 are presumed to have a workplace injury covered by the workers' compensation system.

Waiver agreements with employees do not protect employers from OSHA complaints or enforcement action when a workplace is dangerous. However, the president recently signed an executive order directing federal agencies, like OSHA, to make exceptions for employers who attempt in good-faith to follow agency regulations during the COVID-19 pandemic, which may ease some concerns about agency actions.

Practically speaking, waivers may discourage employees from returning to work and hinder restarting operations as a result. They may also result in negative reactions and publicity concerns, as has occurred in several instances across the country already.

But due to the COVID-19 pandemic, it remains unclear whether courts and states will allow employers to enforce waiver agreements in this unprecedented time. Regardless of whether you decide to institute COVID-19 waivers to your returning workforce, you should develop return-to-work plans including steps to train employees on any exposure danger, how to eliminate those dangers, and best practices to stay safe.

Customer Waivers

Waivers for your customers may limit your company's liability associated with COVID-19, but they may also hurt your business. Employers must carefully decide if the benefits of liability waivers for customers outweigh their drawbacks for their business. Some positive aspects of customer waivers include that they:

- May limit or prevent certain liability, like that in common negligence suits.
- Can highlight safety efforts and communicate risks to your customers.

However, customer waivers have downsides too, as they:

- Do not apply to willful, intentional, or wanton conduct or gross negligence. Consequently, they are less effective at preventing all forms of negligence claims.
- Only apply to language specified in the waiver and must be carefully drafted. Broad examples likely will be ineffective.
- May not apply to entire industries that have a duty to the public in states like California, Colorado, and Washington.
- May scare customers away to competing businesses or cause them to question the sanitation, safety, or integrity of your business.
- Could create negative press in conventional news and online.
- May require refund of membership fees to those clients who refuse to sign.

Evaluating how a waiver will affect your business requires you to look at your industry, business, and geographic area, as well as how your customers or the public will react. Customers generally do not expect to sign a waiver before shopping or dining in a restaurant. But waivers are common in

do not expect to sign a waiver before shopping or dining in a restaurant. But waivers are common in potentially dangerous activities, like extreme sports, where adding a COVID-19 clause may go unnoticed. Overall, customer waivers could impact businesses in more ways than simply mitigating their liability, so businesses must first consider potential unintended consequences.

Other Strategies: Notices And Questionnaires

Alternate routes to limiting liability may be more beneficial than waivers for many businesses. Businesses may avoid the potentially ominous effect of forcing customers to sign waivers by using questionnaires or notices.

A questionnaire asks entrants to the premises questions about whether they have any of the symptoms of COVID-19 or were exposed to it. A questionnaire could also communicate the employer's reasonable actions to comply with government guidelines for sanitation, social distancing, mask wearing, and other efforts that the employer uses to keep their guests and employees safe. This strategy could allow the employer to show it took affirmative steps to exclude sick people from its workplace.

But businesses still need to consider how their customers will react to such a questionnaire. Implementing a questionnaire may deter some customers who find it an impediment or feel it invades their privacy, while others may feel safer coming to your business because you screen everyone who enters.

Notices provide a more streamlined approach, communicating the same information as a questionnaire about the business' steps to keep its premises safe, without requiring the individual to physically sign away any perceived rights. Communicating the rules and restrictions without asking questions or for a signature, notices require fewer steps from employers and customers than waivers and questionnaires.

Either approach requires employers to provide a handout or post signage at all entrances to the building that broadcast safety information and reasonable actions and prohibit sick or exposed persons from entering the building. These strategies allow people to feel safer and accept the risks when they enter the workplace.

Choosing A Strategy

Waivers have limited but potentially valuable benefits if enforceable. Employers should weigh those benefits against the potential impact on their business and carefully consider all their options, such as questionnaires or notices that communicate information and allow guests to assume risk.

No strategy can eliminate a company's obligation to take reasonable actions to protect its employees and customers. The CDC, OSHA, and state or local authorities publish guidelines and guidance that businesses should follow. Demonstrating you followed such guidance will be the best proof your company acted reasonably in responding to COVID-19 risks.

Whether an employer institutes employee or customer waivers, they should develop written plans to reopen that include training for their employees on these guidelines and that document their efforts to comply. Ignoring these guidelines will make workplaces less safe and potentially expose employers to civil suits and government enforcement actions.

What Should Employers Do?

As you begin the process of reopening, you should familiarize yourself with our alert: [5 Steps To Reopen Your Workplace, According To CDC's Latest Guidance](#). You should also keep handy our [4-Step Plan For Handling Confirmed COVID-19 Cases When Your Business Reopens](#) in the event you learn of a positive case at your workplace. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of [our Post-Pandemic Strategy Group Roster](#).

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