COVID-19 AND WAIVERS: CONSIDERATIONS AND PRACTICAL TIPS

Given the concern of becoming a source of transmission of COVID-19, businesses and other organizations may try to reduce any risk of liability under negligence and occupiers' liability laws, by having their clients or guests enter into waivers prior to entering their workplace or other hosted events. Are these documents effective? The answer, like many things these days, is, "it depends". In this post, we will walk you through some of the relevant considerations.

WAIVERS – THE BASICS

Let's start with some basic background. A liability release (or waiver) is an agreement by which a person assumes the risks of attendance at a particular location and agrees not to hold the organization liable, if the attendee experiences harm or losses that are addressed in the waiver (in this case, contracting COVID-19). If you're trying to return to normal day-to-day operations, you might consider if it would be appropriate to require customers and other visitors to agree to a liability release, as a condition of attending a place of business or an event.

Broadly speaking, waivers are a legal vehicle used by a variety of organizations to try to reduce their exposure to liability. They attempt to transfer risk from your business to the individual, by eliminating the individual's right to sue your business for harm or losses that are experienced as a result of participating in an activity or otherwise attending your place of business. The key element of a liability waiver is called the exclusion clause, which is designed to absolve your business from liability, if an individual is injured or otherwise suffers harm. For example, if you've ever been to a country bar and mustered enough courage to take a ride on the mechanical bull, you may have been asked to sign (or scribble) a waiver which releases the bar from liability, if you are injured.

LIMITS ON ENFORCEABILITY

Be warned that waivers are not always effective – there are several arguments against enforceability that a person can raise, if they were injured after signing a waiver releasing an entity from liability.

A waiver is normally not enforceable unless reasonable notice of its restrictive terms has been given to the person who signed it. This means it is important to give the person a reasonable opportunity to review and understand the waiver, before it is signed or otherwise entered into (for example, electronically). Some businesses set out waiver language on signs that are prominently placed at the business's location – depending on how clear the language is, and how it is brought to the person's attention, the person might be able to successfully argue they were not given sufficient notice of the waiver. Another approach that is used by some businesses is to print the waiver language directly on an admission ticket. This is common with sporting events, for example.

A waiver that may otherwise be enforceable is subject to the contra proferentem rule, which means that terms and potentially ambiguous clauses within the waiver will be given the narrowest possible interpretation against the interests of the drafters of the waiver – in other words, if a court finds a waiver

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is unclear, it tends to resolve the lack of clarity in favour of the person who signed the waiver, rather than the business that is trying to rely on it. Historically, courts have been reluctant to find waivers to be a complete shield against liability, especially where they are being used to relieve defendants of responsibility for their own negligent acts. Very clear language which specifically refers to negligence is required to provide coverage in these circumstances.

One of the leading cases from the Supreme Court of Canada on the applicability of liability releases in waivers, and the three factors that will be considered as to whether the waiver will be upheld, is from a case called *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4.

The first question the court will ask is whether the matter that is the subject of the lawsuit is something that the liability waiver specifically considered, and intended to cover within the scope of its release of liability. Second, were the circumstances surrounding the signing of the waiver completely unfair to the signing party, for example, did the party who would benefit from the waiver abuse its bargaining power or did the signing party know what they were signing? Lastly, did the conduct of the party relying on the waiver approach criminality or egregious fraud, to the point where the countervailing public policy that favours freedom of contract is overridden?

A separate enforceability issue arises, with respect to minors. At law, the enforceability of any agreement that has been entered into, by a minor, may be challenged either by the minor, or on their behalf. A business which invites minors onto its property would therefore consider having a parent or guardian provide a waiver, on behalf of the minor.

WAIVERS AND COVID-19

Applying these principles to the global pandemic we currently find ourselves in, a waiver could protect your business from exposure arising from lawsuits regarding possible COVID-19 transmission. However, because of the lack of precedent, it is difficult to estimate the effectiveness of a COVID-19 waiver until one is tested in court.

An early example that we can keep an eye on is south of the border, as the Trump administration required attendees of its campaign rally in Tulsa, Oklahoma, to sign a waiver that absolved the president's campaign of any liability from virus-related illnesses associated with attendance at the rally. By registering to attend the rally, supporters were asked to acknowledge "that an inherent risk of exposure to COVID-19 exists in any public place where people are present", and that all attendees and guests are "voluntarily assum[ing] all risks related to exposure to COVID-19" and agree not hold the Trump administration, the venue or any organizers liable.[1]

This type of wording in the waiver's exclusion clause, which was required to attend the campaign rally, may be mirrored in the future by organizations who wish to have in-person events. Companies could similarly use this type of waiver as a precursor before clients come into their offices for in-person services and meetings.

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PRACTICAL TIPS AND TAKE-HOME POINTS

Ultimately, a waiver is only one piece of your overall risk mitigation strategy. Here are some take-home points to consider:

- It is crucial for a COVID-19 waiver to be drafted clearly and narrowly, and to tailor the exclusion clause that absolves your business from liability for the specific risk of contracting the virus that might apply to the organization. A court may be more hesitant to uphold a waiver that only contains generic language about any injury associated with attending the event.

- The attendee must be given clear notice on the waiver that they are assuming the risk of the potential to contract the virus at your place of business or event, and that they are agreeing to not to hold the host responsible for any related harm or injury that might result.

- Having attendees sign a waiver before attending an event, without taking any other precautions, might be insufficient to address any exposure to liability – there is still a requirement under emergency public health orders for the host to take reasonable steps to follow heath care guidelines, enforce social distancing and sanitization, to further reduce their risk of an attendee contracting the virus.

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[1] Oliver Milman, "Trump campaign asks supporters to sign coronavirus waiver ahead of rally" (12 June 2020), online: *The Guardian* https://www.theguardian.com/us-news/2020/jun/12/trump-rally-supporters-sign-coronavirus-waiver.

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