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How NY Businesses Should Approach COVID-19 Waivers

By **Russell Yankwitt and Dina Hamerman** (August 31, 2020, 12:36 PM EDT)

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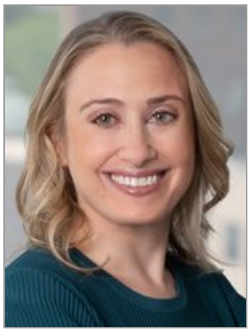

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As New York reopens after the COVID-19 shutdown, business owners and community leaders are anxious about potential liability exposure as people are now free to visit stores, restaurants, houses of worship and more.

The burning question on everyone's mind is: Are businesses and institutions liable if a patron, congregant, student or employee contracts the novel coronavirus and believes that it occurred at a particular establishment? Should signing a waiver of liability now be a prerequisite for anyone entering an establishment? And if so, how much protection will the waivers provide in the state of New York?

To date, neither New York nor the federal government has passed legislation addressing general corporate and/or institutional liability for COVID-19-related injuries. (At the height of the pandemic, Gov. Andrew Cuomo signed a law granting hospitals and nursing homes immunity from most malpractice claims, but that protection was recently rescinded.) Absent that guidance, examining New York's general approach to waiver enforceability provides a useful analytical framework for what we might expect in COVID-19 litigation.

The case law suggests the short answer to enforceability is: It depends. Under New York law, a liability waiver is enforceable if: (1) it does not violate the public interest, (2) the intention of the parties is expressed in unmistakable language, and (3) the provisions are clear and coherent.[1]

On the other hand, liability waivers are disfavored and closely scrutinized by the courts. As a result, numerous limitations on enforceability have arisen in both statutes and common law. We highlight several of these restrictions below and then offer practical tips for drafting liability waivers in situations where they may be enforceable.

Nature of the Entity

Between the New York General Obligations Law and common law, several categories of businesses cannot rely on waivers to limit their liability for negligence claims. The General Obligations Law voids waivers for businesses that are deemed to serve the public, including: landlords, caterers, building service and maintenance contractors, garages, and recreational facilities, such as pools, gymnasiums and places of public amusement, that charge a fee.

Similarly, the New York courts have refused to enforce exculpatory agreements if they are found to violate public policy by conflicting with an overriding public interest or if enforcement would constitute an abuse of a special relationship between parties. Examples include: (1) employers requiring waivers as a condition of employment, (2) public utilities, (3) common carriers unless a reduced fee is charged, and (4) medical providers and home health aides.

Because the application of the foregoing statutes and precedent to COVID-19 waivers has not been tested, owners of the businesses identified above should require patrons to sign COVID-19 waivers

before patronizing their establishment. It seems likely that litigation will ensue over the enforcement of those liability waivers, and no one can predict how the courts will decide on the issue.

As an example of that unpredictability, notwithstanding the fact that General Obligations Law Section 5-326 explicitly precludes the use of liability waivers by places of public amusement or recreation, a New York federal court held in 2017 in DiFrancesco v. Win-Sum Ski Corp., that liability waivers may still be enforceable against New York ski resorts.

The decision was based, in large part, on an established scheme governing conduct at ski resorts — an argument that reasonably could be made regarding reopening businesses. However, these business owners should keep in mind that a COVID-19 waiver might not protect them against negligence claims.

Type of Injured Party

In addition to limitations on the type of business that can enforce a liability waiver, New York limits the type of injured party against whom a waiver can be enforced. In particular, waivers signed by parents/guardians on behalf of minors are generally unenforceable on public policy grounds, while liability waivers signed by minors alone are always unenforceable.

Once again, the application of these principles has not been tested for COVID-19-related injuries, though at least the court in the DiFrancesco decision discussed above has held that a waiver signed by a guardian on behalf of a minor is potentially enforceable under certain circumstances. Therefore, like the businesses that may not be eligible for liability waiver protection, we recommend having parents and guardians sign COVID-19 liability waivers on behalf of minors, with the understanding that those waivers ultimately may be unenforceable by the courts.

Type of Misconduct

In cases where liability waivers are not precluded by statute or common law, New York still does not permit waivers for gross negligence, reckless conduct, willful/wanton conduct, or intentional acts. Gross negligence is defined as conduct which "differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."[2]

In terms of COVID-19 waivers, the practical takeaway is that all businesses and institutions must precisely follow state and federal guidelines when reopening and conducting business.

For example, stores should strictly adhere to capacity guidelines, mask requirements, and disinfecting protocols. Businesses and institutions also should have policies in place addressing sick employees. Just as entities must maintain their entryways and stairwells to ensure their physical structures comply with applicable statutes and codes, so too must they comply with guidelines designed to protect patrons from being infected with COVID-19. The failure to do so could be considered gross negligence or reckless conduct by the courts.

Drafting Enforceable Liability Waivers

With the above caveats in mind, we turn to practical tips for drafting COVID-19 liability waivers. Courts strictly construe liability waivers and require a clear, intelligible and explicit waiver of specific risks to ensure that the releasor is freely and knowingly relinquishing the right to sue for injuries.

The last thing businesses need is to go through the trouble of obtaining a release only to have a court strike it down on the grounds that it is unclear or overreaching, if a provision on gross negligence or reckless conduct is included in it. Instead, a waiver should clearly state that it is intended to release from claims for physical injury, illness or bodily harm caused by negligence and arising out of exposure to COVID-19.

Takeaway

Until New York or the federal government passes legislation expressly addressing COVID-19 waivers, New York businesses and institutions should adopt a two-pronged approach to mitigate liability

exposure.

All entities should require patrons to sign liability waivers containing an explicit release for negligent conduct causing injuries from COVID-19 exposure, with the understanding that certain entities may not be able to rely on exculpatory agreements. The waivers should be drafted with precision and care, preferably by an experienced attorney, to maximize the likelihood of enforcement.

In addition, entities should strictly adhere to current state COVID-19 reopening guidelines (and remain abreast of any changes to them) because even the most carefully worded liability waiver will not protect businesses and institutions from gross negligence.

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[1] See, e.g., Gross v. Sweet, 400 N.E.2d 306, 309 (N.Y. 1979).

[2] Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd., 81 N.Y.2d 821 (1983).
