

Visitors? Safety: Using a Waiver to Avoid Getting Sued for COVID-19 Infections



Signs and forms like this purporting to shield the owner of a facility against liability are likely to become a fixture in the post-COVID-19 workplace. The idea is to notify visitors that they're entering the facility at their own risk and in so doing, waiving their rights to sue the owner for any illness or injury they suffer while on the premises. Of course, that includes COVID-19 infection. It seems like a simple, cost-effective way to limit liability risks to visitors who claim they got sick while at your facility. But will it work? It depends, in large part, how you draft the waiver.

The Sources of COVID-19 Infection Liability Risks

OHS laws require you to protect workers against COVID-19 infection by following current public health guidelines on social distancing, hygiene, disinfection, etc. Failure to do so can result in stop work orders, OHS fines, workers' comp claims and other nasty consequences. But for the most part, you won't have to worry about getting sued by your workers because workers' comp laws bar workers from suing their employers for work-related illnesses and injuries.

However, workers' comp doesn't bar lawsuits by non-workers who get ill or injured while visiting your facility. Stated differently, as the owner of a facility, you have a legal duty to protect visitors. That duty stems principally from 2 laws:

- **Negligence law:** Visitors who contract COVID-19 as a direct consequence of your failure to use reasonable care to protect them can sue you for money damages to compensate them for the losses they suffered as a result; and
- **Occupiers' liability laws:** Visitors who get infected at your property can also sue for money damages under statutes found in all jurisdictions that require the occupier of a property to keep visitors reasonably safe from harm when they enter it.

The Liability Waiver

The liability waiver, aka release or exculpatory agreement, is designed to limit legal risks by getting another person to waive, i.e., voluntarily give up, their legal right to sue for injuries or damages. While workers' comp makes them unnecessary for workers, waivers may be valuable in limiting potential liability to visitors. There are 2 ways to go about getting a COVID-19 waiver from visitors:

- Having the visitor sign a written waiver agreement; and/or
- Posting a sign notifying visitors that by entering the facility, they're agreeing to waive their rights to sue.

The big question: Would such waivers be enforceable? Although there's never been a COVID-19 waiver case, centuries of waiver litigation provides pretty reliable clues of how courts would decide such a claim.

4 COVID-19 Waiver Pitfalls to Avoid

The starting point is that courts won't enforce waivers if they think the property owner is taking advantage. So, you need to be aware of the red flags.

1. Lack of Negotiation

A fundamental problem with waivers is the disparity in negotiating power between the owner and the party granting the waiver. In fact, waivers are rarely actually negotiated. The owner creates the waiver and requires the other person to sign it. And, in the case of a sign, the waiver doesn't even require a signature to take effect. However, courts will still enforce sign waivers as long as they're conspicuously posted at the entry and the owner can prove the visitor actually saw them.

2. Lack of Clarity

Another problem with waivers is that they tend to be laden with legal jargon and boilerplate, often in very small print that visitors are highly unlikely to read, let alone understand. That's why courts will only enforce a waiver if it's clear and unambiguously written in a way that ensures the reader understands both the hazards to which they're exposed by entering the facility and the rights they're giving up. In the context of COVID-19, that requires spelling out the risks of infection and plainly stating that they won't be able to sue you if they think they contract the virus at your facility.

3. Lack of Consideration

Contractual promises and obligations aren't enforceable unless the person who makes them receives consideration, i.e., something of value in return. The COVID-19 waiver, therefore, needs to provide for such consideration, namely, gaining entry to the facility.

4. Unconscionability

"Unconscionability" means an agreement that's unenforceable because it's so unfair and one-sided in favor of the person that drafted it. Similarly, the

court may deem the waiver unenforceable as being contrary to public policy. Although each case is different, there are some fairly clear lines that would probably apply to a COVID-19 waiver:

- **Most Enforceable:** Waiver of the visitor's right to sue for COVID-19 infection that wasn't the owner's fault;
- **Possibly Enforceable:** Waiver of the visitor's right to sue for COVID-19 infection even if it was the result of the owner's negligence;
- **Unenforceable:** Waiver of the visitor's right to sue for COVID-19 infection attributable to the owner's intentional, reckless or grossly negligent conduct.

Model COVID-19 waiver form.