

Understanding waivers and release agreements



If you own or operate a business or have attended a private or public event or activity, you may have encountered a liability waiver or release agreement. A common practice that many business owners and service providers often rely upon is the use of liability waivers.

Liability waivers and release agreements can be key risk management tools to help protect business owners and service providers from liability associated with risks inherent to their operations or services. They are

communicated by various means ranging from a service receipt or invoice language, to warning signs such as “Swim at your own risk!”

With many applications and an increase in usage, you, as a business owner or service provider, may wonder if liability waivers are effective or even worth the paper they’re written on. Certain factors and local laws may determine if waivers and release agreements will be enforceable or not.

Below, we will discuss some types of waivers and release agreements used today, factors that may determine their enforceability, and things you may wish to consider when drafting or implementing these agreements. This document is not intended to, and does not, convey legal advice. It is always advisable for you to discuss matters surrounding waivers and releases with your attorney.

Exculpatory agreements

Liability waivers and release agreements are forms of exculpatory agreements. Generally speaking, an exculpatory clause or exculpatory agreement is a provision in a contract that attempts to relieve, for example, a service provider from liability due to a loss or damage sustained by a participant utilizing the services offered.[1] There are several types of exculpatory agreements used today for various service applications.

Types of exculpatory agreements

- **Liability waiver:** In recognition of the inherent risks associated with a given activity (for example, water skiing), the business entity providing access, controlling, or otherwise making available the risky activity will seek to reduce and/or eliminate their liabilities relating to damages, injuries, claims, or losses stemming from the participation in the risky activity. This reduction/elimination of liabilities is attempted to be achieved by utilizing a liability waiver.
- **Assumption of risk agreement:** A pre-participation document or clause whereby, for example, a customer agrees in advance that the business owner will not be liable for losses relating to the inherent risks associated with a specific activity or event. The agreement establishes that the customer is aware, acknowledges, and agrees to accept the risks presented by a given activity or event.
- **Disclaimers/sign posting:** A statement posted that attempts to deny or limit responsibility. Sign postings are an example of a disclaimer. The sign is used to attempt to limit the scope of obligations and rights associated with access or use of a facility, device, or area. An example of a sign disclaimer is “Vehicles Are Parked at Owner’s Risk.”
- **Tickets/receipts:** Very often tickets to events and/or receipts include fine print on the reverse side. This text can be used to include exculpatory statements and advisements. A common example can be found on the back of a Major League Baseball ticket with the foundation of the text being, “Ticket holder accepts all risks of illness/injury.”
- **Click-wrap/shrink-wrap (e-contracts)**
 - **Click-wrap** — Accepting the terms of a user agreement via clicking “yes” to utilize an app or access a website. The agreement most often will include an exculpatory clause, whereby the user accepts the liabilities relating to their activities.
 - **Shrink-wrap** — The name was drawn from the shrink wrap packaging on CD-ROMs that were, at one time, the primary means of procuring new software. The software comes with licensing agreements which can

also be expected to include exculpatory clauses.

Enforcement of liability waivers

Enforcement of liability waivers is state specific, and some states may conclude that they are typically unenforceable because they are generally poorly written or violative of public policy. In addition, another common reason they are not enforceable is in the determination of whether gross negligence was exercised by the party seeking a waiver of liability. In general, gross negligence is an extreme form of ordinary negligence and can be characterized as deliberate and reckless disregard for the treatment of others. [2]

Liability waivers, if well written, may protect against ordinary negligence (with exception of gross negligence) in some states. For example, some states have moderate or strict criteria that if adhered to may lead to effective enforcement. In contrast, even the most effective and well-written waiver may not be enforceable in some states. For example, some states may prohibit liability waivers for personal injury, but may allow releases related to property damage.

Liability waivers and children

For many years waivers signed by parents on behalf of their minor children were not enforceable based upon a matter of public policy. However, in recent years, courts in some states have enforced parental waivers. While waiver law is pretty straightforward when applied to adults, minors, however, are generally unable to legally sign a contract and are therefore not bound by the waiver. This may leave a facility liable for all negligent acts regarding minors and leaves them open to a lawsuit either by the parents of the child or from the child themselves.



Four important tips to consider regarding liability waivers and children

1. A liability waiver signed only by a minor is not a valid contract.
2. Most courts have ruled that a parent cannot sign away their child's right to sue for negligence.
3. Only a minority of states have upheld a waiver signed by a minor and a parent.
4. Agreement to participate forms and permission slips do not grant liability protection to a facility.

Overall, understanding your state's position on parental waivers is important in the usage and successful enforcement of these waivers. Your counsel can help you understand the most recent court actions regarding the enforcement of these waivers.

Posting warning signs

Practically all businesses post warning signs to attempt to transfer liability of potentially dangerous conditions on their property or in their building. Warning signs may possibly provide some liability relief for you as a business owner; however, precautions still should be taken to reasonably control the exposure. No sign will erase the legal duty owed to protect the public. Discuss with counsel any warning signs on your property as well as how —and whether — they can help you transfer liability.

Things to consider when implementing effective agreements

A well-written liability waiver can be very beneficial in protecting your business. Below are a few things to consider when drafting or implementing a liability waiver.

- Consult with a lawyer familiar with this area of law in your state.
- Bring attention to the waiver. Do not hide the waiver inside a document or make it hard to find.
- Customize your document to fit your operations. Do not utilize a generic “one size fits all” approach.
- Make sure the inherent risk is clearly outlined in the waiver, and whose conduct is being waived.
- Ensure each responsible participant signs a waiver, to avoid multiple signatures on one document.
- Be willing to explain the risk. Have a representative with authority available.
- Store and maintain all signed waivers.

Liability waivers are still one of the best risk management tools available to business and service providers to protect against damages, claims, and lawsuits associated with inherent risk. Four best practices that may aid in successful enforcement include:

1. Understanding your state’s position on liability waivers. Seek legal advice in this area.
2. Address all safety issues immediately and take steps to maintain the property in a safe condition.
3. Have your lawyer draft or implement waivers that are clear and customized to your operations and risk.
4. Establish and maintain good documentation and recordkeeping practices.

Where to find assistance

For assistance in developing a solid liability waiver, we always suggest working with an attorney who is familiar with contract and tort. Lastly, your insurance agent is available to assist with insurance program needs.



References

1. Matthiesen, Wickert & Lehrer, S.C. (2021). Exculpatory Agreements and Liability Waivers In All 50 States. Hartford, WI.
2. Rothman, J. (2020, October 02). When Liability Waivers Are Unenforceable. Retrieved from The Rothman Law Firm LLC: <https://www.rothmanlawyer.com/when-liability-waivers-are-unenforceable/>

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