

Publications

Returning To Work: Are COVID-19 Waivers A Good Idea?

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Now that employees are returning to work and businesses are reopening their doors to customers, many businesses are searching for ways to limit liability relating to potential COVID-19 infections. To that end, some employers are considering whether to require COVID-19 liability waivers for their employees, customers, contractors, and other visitors to their facilities.

What is a Waiver?

A waiver in its simplest form is a contract in which a party knowingly and voluntarily gives up a legal right. The party requesting a waiver is typically seeking to disclaim liability for various potential outcomes, such as when a health club asks members to sign a waiver related to the use of its facilities as part of a membership agreement. Waiver agreements also typically include additional provisions relating to assumption of risks, covenants not to sue, and indemnification. If enforceable, a waiver agreement would eliminate liability for the risks described in the agreement.

Employee “Return to Work” Waivers

Requiring employees who are returning to work to sign COVID-19 waivers is problematic in several respects. First, state workers' compensation statutes are normally an employee's exclusive remedy against an employer for injuries and occupational diseases arising in the course and scope of employment. Employees are not permitted to prospectively waive their rights under state workers' compensation laws. Consequently, a return-to-work waiver seeking to limit liability related to an employee contracting COVID-19 in the workplace would not be enforceable under workers' compensation laws.

However, let's assume that an employee attempts to get around the workers' compensation system by filing an intentional tort claim alleging that the employer's willful or intentional conduct resulted in the employee contracting COVID-19 in the workplace. Would a waiver at least be helpful in this situation? In all likelihood, no. While many states allow prospective waivers of negligent conduct, the general rule

is that such waivers do not apply to gross negligence or to willful or intentional conduct. Thus, a return-to-work COVID-19 waiver would not be effective against intentional tort claims.

It is also unlikely that a COVID-19 waiver would protect against claims by employees' family members who claim to have contracted the virus as a result of the employee's exposure at work. The employee cannot waive liability on behalf of his or her spouse or adult children. Also, while parents may have the right to waive claims on behalf of minor children, it is questionable whether a court would enforce such a waiver made by only one parent who was required to agree to the waiver in order to return to work.

Requiring employees to sign waivers related to an illness (COVID-19) arising out of workplace exposure also arguably requires the employee to assume the risk that the workplace is unsafe. This could be regarded as an attempt by the employer to avoid its statutory obligation to provide a safe workplace under the Occupational Safety and Health Act (OSHA), which requires employers to furnish "a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm" and to "comply with occupational safety and health standards promulgated under the Act."

Finally, requiring employees to sign COVID-19 waivers may result in bad publicity for an employer as well as negative reactions from employees. Several employers around the country have received negative press on a national level for requiring employees to sign waivers. Employees already concerned or reluctant to return to work due to COVID-19 fears may become even more concerned or reluctant, believing the waiver request means the employer views the conditions as unsafe or at least risky.

Alternative Approaches

As an alternative to waivers, there are a number of actions employers can take to help reduce their liability and keep their employees as safe as possible. Before employees return to work, employers should ensure that they have policies and procedures in place that comply with the most recent COVID-19 recommendations and/or orders from the CDC, OSHA, the EEOC, and state and local health authorities. When employees return to work, employers should clearly communicate these policies to employees. The policies should include a procedure for reporting non-compliance and a provision forbidding retaliation for making such reports. Employers should also consider requiring employees to sign an acknowledgment indicating that they have received a copy of the policies and certifying that they will comply with the provisions of those policies.

Independent Contractors and Vendors

While COVID-19 waivers for employees likely are not effective or helpful, such waivers may be more useful for avoiding or at least limiting liability for claims from vendors or independent contractors who perform work for the business. The waiver may be incorporated into existing agreements with these individuals, and should include additional provisions relating to assumption of the risk, a covenant not to sue, and indemnification. To the extent the employer is requiring employees to sign an acknowledgment form regarding the employer's COVID-19 policies, vendors and independent contractors should be required to do the same.

Customer/Visitor Waivers

Depending on the circumstances, some businesses may want to consider requiring waivers for customers and/or visitors who enter their facilities in an effort to limit liability associated with exposure to COVID-19. Businesses need to carefully consider if the benefits derived from such waivers outweigh the potential drawbacks. Businesses should keep in mind that prospective waivers of this nature are typically effective against negligence claims, but not against claims of gross negligence or willful or intentional conduct. To be effective, such waivers must be drafted carefully to address the specific areas of liability for which the waiver is sought. A clear intention to waive specific rights is essential. In addition, state laws may forbid or limit the usefulness of waivers in certain contexts. Requiring waivers could also send customers to competitors, cause them to question the safety and sanitation practices of a business, or create negative publicity. The decision about whether to require waivers is likely to be industry or business specific. For example, a customer at a retail store would not expect to sign a waiver, whereas a gym member might be accustomed to signing such waivers.

As an alternative or supplement to requiring waivers for customers and visitors, businesses may also want to consider placing posters at entrances to their facilities. These posters could communicate its compliance with federal, state, and local requirements, such as cleaning, social distancing, and face covering requirements; advise customers and visitors who are symptomatic not to enter the building; and provide information as to other steps the employer is taking to keep customers and visitors safe. This approach could be helpful for providing proof of the affirmative steps the business took to protect customers and visitors from exposure to COVID-19.

Conclusion

COVID-19 waivers are not a panacea, particularly with regard to employees. If drafted carefully, they may provide limited but potentially valuable benefits with respect to contractors, visitors, and customers. Businesses should weigh the benefits and the potential downside of waivers in the context of their specific business model. In the end, no strategy regarding waivers can replace the need for an employer to take reasonable steps to protect its employees and others who enter its premises and to comply with applicable government requirements regarding COVID-19.

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Vorys COVID-19 Task Force

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts [located here](#)). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).