

IS YOUR BUSINESS CONSIDERING HOSTING A LARGE EVENT OR GATHERING? IF SO, BE SURE TO CONSIDER A COVID-19 WAIVER

Hodgson Russ COVID-19 Litigation and Employment Action Team Alert
August 6, 2020

While the global crisis stemming from the coronavirus pandemic continues, most states have started to re-open and permit “large” gatherings of some sort. As the restrictions are relaxed and stay-at-home orders are lifted, businesses are faced with navigating decisions about the extent to which they should re-open. This is especially challenging for businesses that are defined by, or involved with, events hosting large groups of people.

Because of the pandemic, any activities outside the home or in close proximity to others pose an inherent risk. Large gatherings pose a heightened risk of potential liability for exposure to the coronavirus, as person-to-person contact increases and enforcement of social distancing guidelines becomes increasingly difficult. Even if a business or event organizer takes great measures to protect against exposure, there remains the risk that a patron will sue, claiming that he or she was exposed to or contracted COVID-19 at the event because the business purportedly failed to take reasonable precautions to prevent the spread of the virus. This risk has resulted in some businesses questioning whether it is even worth re-opening their doors while the pandemic goes on. To address this concern, the Senate has proposed legislation to limit liability for coronavirus exposure claims, but the extent of those protections remains to be seen. For now, it is critical that businesses explore how best to protect themselves from potential liability and defend against claims relating to COVID-19, especially when hosting a large gathering.

First and foremost, businesses must be familiar with and carefully comply with all government orders and guidelines when hosting events or large gatherings. Liability waivers and releases, in which patrons explicitly assume the risk of contracting the coronavirus by attending the event, can also afford protections to manage potential liability and mitigate risks. Because the unprecedented nature of the coronavirus makes it difficult to predict the enforceability of a waiver covering the risks of the pandemic, a carefully drafted waiver specific to COVID-19 should be considered to best help protect your business from potential liability for exposure to the coronavirus. General liability waivers may not be sufficient to insulate businesses from COVID-19-related litigation. Instead, the COVID-19 waiver should clearly describe the risks specifically related to COVID-19 exposure, and also require the

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patron to acknowledge that he or she fully understands and expressly assumes those risks by attending the event. It should use clear, easy to understand, everyday language, and avoid using “legalese.”

It is important to note that not all liability waivers and releases are valid, and enforceability varies by state. For example, New York law does not allow a place of “amusement” or “recreation” to excuse itself from liability for damages caused by the owner’s or operator’s negligence. In New York, a liability waiver is enforceable when: (1) it states the intention of the parties in unmistakable language to limit the liability of the business for negligence or failure to use due care; (2) the agreement is clear and coherent, with language that is unambiguous and clearly understood by the person signing it; and (3) the agreement does not violate public policy, *i.e.*, a public interest or abuse of a special relationship such as employer/employee or common carrier/passenger. In addition, in New York, a waiver will not shield a business from its own gross negligence.

Courts have not yet determined the enforceability of a COVID-19 waiver, or whether such a waiver contravenes public policy. The public policy analysis will likely spark much debate surrounding the balance between public safety concerns, the legal remedies available for those injured by COVID-19, and the economic need for safe harbor from expansive liability. Liability waivers may be deemed enforceable so that businesses can operate with some level of protection, but this will likely depend on the nature of business, the type of event, the number of people involved, and the need to host the large event. The sympathies of a court may not rest with individuals who have chosen to go to populated areas during the midst of a pandemic for non-essential trips, and lie instead with the businesses trying to stay afloat during challenging times.

Takeaway

It is difficult to predict how courts will treat liability waivers for COVID-19. But given the seriousness of COVID-19 and its highly contagious nature, businesses should consider COVID-19 waivers to best protect themselves from potential liability. Even if courts construe waivers strictly, like they do in New York, waivers can still operate as a deterrent to suit, and a reminder of the risks associated with attending a large gathering. Event organizers should also be mindful of ever-changing state restrictions that are in place, and constantly monitor the current guidance.

Hodgson Russ attorneys can help you navigate this complicated time and identify how best to protect your business, employees, and customers. To learn more about the potential enforceability of waivers regarding COVID-19, please contact Melissa Subjeck (716.848.1719) or Karalyn Rossi (716.848.1716).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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