

# COVID-19 Waivers

A False Panacea

CSDSIP Risk Bulletin | June 2020

As attention and efforts shift to resuming some – if not all – aspects of normal life, worries about potential liability arise. This is understandable given the potentially devastating consequences of contracting COVID-19. As a result, many are wondering whether some kind of release or liability waiver would be beneficial.

Unfortunately, the value of any kind of COVID-19 release or waiver is far from certain.



## When Waivers Work

Releases or waivers are most valuable in situations where the risk of specific activities may not be known or obvious to the participants. In those situations, having a participant (or parent) sign a release makes sense. An effective waiver clearly describes the potential risks and confirms their willingness to engage in the activity anyway. That way, if the participant is injured and claims they didn't know the risks, there is a piece of documentary evidence to show otherwise.

With COVID-19, the risks are known, both in terms of the danger posed by the virus itself as well as the likely and potential methods for transmission. A claim related to COVID-19 is not going to allege insufficient warning about the risk of contracting the disease from other individuals. The claim is going to allege that you failed to take adequate steps to prevent the transmission of COVID-19 by following all applicable local, state, and federal health guidelines.

In some cases, a release can protect against claims alleging negligence. However, schools in Colorado already enjoy broad protection against negligence claims by virtue of the Colorado Governmental Immunity Act (CGIA). The CGIA does waive immunity and allow claims against schools in a handful of specific circumstances, although it is unlikely any of them would apply in the context of COVID-19, with the following exception.

The CGIA does allow claims against public employees (but not the public entity itself) when the employee engages in “willful and wanton” conduct. In those situations, because the employee acted so far outside the bounds of what a reasonable person would do, they are exposed to personal liability for their actions. It is quite possible that a court would find that deliberately ignoring or refusing to comply with a public health and safety order was “willful and wanton” conduct, and the offending employee would be personally liable for any damages that resulted.

Furthermore, to be effective, a waiver must be voluntary. A waiver may be permissible for optional things like extracurricular activities or after-school enrichment programs. However, a waiver could not be required of all students as a condition of attendance when schools reopen. Nor can waivers shield

# COVID-19 Waivers



employers from potential liability under workers compensation, should an employee contract COVID-19 on the job.

Another argument against relying on waivers is the risk that the misplaced belief that they offer any protection whatsoever could lead to less diligence in following health and safety guidelines. Compliance with all applicable local, state, and federal authorities is the most important element to a safe reopening and will likely afford greater protection against claims than any other step you can take.

## Summary

If you're doing everything recommended by local, state, and federal health authorities, a waiver is probably unnecessary. Alternatively, if you're doing anything less than what is recommended by local, state, and federal authorities, a waiver will not shield you from liability.

- No waiver can protect you from ignoring a public health order
- Compliance with all applicable guidelines makes waivers unnecessary
- Time and energy are better spent documenting your ongoing compliance with health and safety guidelines

## Sample Language

For those Members that feel compelled to include COVID-19 release language in their athletic (or other voluntary activity) participation forms, the following language may be inserted. *Members are cautioned that including such language may offer no protection from liability whatsoever and is not a substitute for exercising the utmost care in following current local, state, and federal health and safety guidelines.*

**PARTICIPATION MAY SIGNIFICANTLY INCREASE THE RISK OF EXPOSURE TO COVID-19 AND/OR OTHER COMMUNICABLE DISEASES. COVID-19 IS A VERY CONTAGIOUS DISEASE THAT CAN CAUSE SEVERE ILLNESS AND DEATH. OLDER ADULTS AND PEOPLE WITH UNDERLYING MEDICAL CONDITIONS ARE AT HIGHER RISK. PARTICIPATION MAY ALSO RESULT IN TRANSMISSION OF COVID-19 OR OTHER COMMUNICABLE DISEASES TO NON-PARTICIPANTS.**

**PARTICIPANTS KNOWINGLY AND VOLUNTARILY ASSUME ALL RISKS RELATED TO EXPOSURE OF COVID-19 AND/OR OTHER COMMUNICABLE DISEASES.**