

Liability waivers for physical or extracurricular activities

Risk Control services
from Liberty Mutual Insurance



The most common reason waivers fail is because they are poorly written. Courts in all states require that waiver language be clear and unambiguous. In addition, many states require specific language for the waiver to be enforceable.

Highlights:

- Involve legal counsel when creating, reviewing, and applying risk transfer documents.
- Ensure the documents are clearly written so the reader understands the risks involved in the activity and can ask informed questions.
- Templates and information supplied by non-legal personnel or internet searches are no substitute for qualified legal counsel.

A frequently requested activity in risk management is to review and provide templates and guidance involving the use of liability waivers for activities an organization would like to conduct. Templates and forms are legal documents and subject to individual state law and vary in application and use, exact wording and context, and creation and execution.

Waivers/releases defined

In the context of events or activities conducted by organizations or schools that need to use waivers or releases, a helpful definition is as follows:

“A waiver or release is the intentional and voluntary act of relinquishing something, such as a known right to sue a person, educational institution, or organization for an injury. Waivers and releases are commonly used by the sponsor of an event (e.g., a marathon) and schools when competitors, students, faculty, or visitors participate in a private or institution-sponsored activity. The term waiver is sometimes used to refer [to] a document that is signed before any damages actually occur. A release is sometimes used to refer to a document that is executed after an injury has occurred.”¹

Limitations and common issues

Using homemade waiver documents or generic templates and not involving qualified legal counsel can lead to issues where an intended waiver maybe deemed invalid.

Avoid language that could nullify the document based upon public policy considerations. In most states, courts will not enforce waivers intended to protect the provider against liability for gross negligence, reckless conduct, willful/wanton conduct, or intentional acts or injury. Waivers may also fail if they were deemed by courts to be primarily used to escape liability exposure when safety was not considered appropriate or fully developed.

Some states have different interpretations and court decisions concerning waivers executed by minors and their parents/guardians. Some states may require the signature of a witness. To enhance the likelihood of validity and enforceability, seek qualified legal counsel for the organization’s specific jurisdiction(s) to create legal documents that fit their needs and circumstances. This can help clarify how a given waiver can be used and where it may fall short should an injury or loss occur.

General do's and don'ts

When looking at a situation where a liability waiver or release might be used as a risk reduction method, consider the following recommendations.

- Do fully understand the event or activity. Each event/ activity should be individually evaluated for safety (risk identification and risk analysis of the risk management process). If an acceptable degree of safety is not anticipated during the setup, performance, and following the activity/event, avoid the activity/event altogether.
- Do carefully document the entire planning process.
- Do determine the physical and health requirements of the participants based on the activity involved. The more strenuous the requirements and activity the more detailed the documents should be. Consider a brief but well-explained description of the exposures involved, health risks or warnings, and medical clearances needed to participate. As an example, it is not uncommon for state high school athletic associations to require and execute a stand-alone liability waiver concerning concussion exposures in sanctioned sports and activities.
- Do understand the importance of the waiver/release compared to the activity/event. Develop the document based upon your analysis, need, and specific situation. Activities/ events that can produce a higher injury frequency and/or higher severity should have well-crafted documents suited to the specific activity, situation, and jurisdiction. Boiler plate documents or templates are not recommended since they may not be suited for these specific types of exposures.
- Do use pre-approved templates when appropriate. These would be for situations where frequency and severity of injury are less likely. Templates should be reviewed, approved, and provided by your qualified legal counsel and made specific for the jurisdiction(s) where the activity/event will take place. Templates may also be provided by leading national or state organizations such as the National School Board Association (NSBA), State Department of Education, etc.
- Do have your documents reviewed/updated on a regular basis. State and local laws may change which could influence the enforceability of the documents.

- Don't use waivers/releases as a primary means of risk transfer where user safety is not adequately addressed. Appropriate risk control measures should always be considered first. Waivers/releases should be viewed as a "safety net" in the event, despite best efforts, a loss or injury occurs.
- Don't create your own documents or use templates from other organizations (schools) or the internet without review and approval by your qualified legal counsel.
- Don't take shortcuts. Devote the appropriate resources to create an effective document that serves the purpose of its designed use.

Effective waiver characteristics

In an article written by sports law and risk management expert Doyice J. Cotten for *Athletic Business*, he reminds readers there is no magic formula or perfect waiver.

He advises:

"It is important to remember that there is no perfect formula for a perfect waiver. The requirements vary somewhat from state to state. In some states, the public policy favors waivers and the courts are quite lenient in enforcing them – often enforcing what would be considered a poor waiver that would not be enforced in a strict state. In other states, the courts do not favor waivers and have stringent requirements for enforcement. It is not unusual for a well-written waiver in a strict state such as Indiana, New York, or Pennsylvania to fail when challenged in court because of one missing criterion or an ambiguously worded phrase. On the other hand, it is not uncommon for a brief, poorly written waiver to be enforced in a lenient state such as Georgia, Tennessee, or Ohio." ²

Even though a perfect waiver does not exist, there are some important characteristics to consider. The listing and discussion below is not all-inclusive.

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Document format

Waivers and releases need to be stand-alone documents and not combined with other documents or processes, such as including waiver language on application for events, registration forms, team rosters, etc. Titles should be descriptive and clear.

It is important to know from the title what the intended purpose of the document is. Use titles such as “Waiver of Liability,” “Assumption of Risk,” “Release of Liability,” etc.

- Use easy-to-read language that is easily understood, clear, and unambiguous.
- Use a font size large enough so the reader can review and understand the nature of the risk being transferred and assumed.
- Explain legal terms not commonly recognized or understood.
- Exculpatory language should stand out and be conspicuous by using any of these font styles: underlining, bold text, upper-case font, italics, etc.
- For readers where English is a second language or not understood at all, have a document available in their native language. Be aware of situations involving a minor where the child may comprehend and communicate in English, but the parents or guardians may not.

Knowledge of and assumption of risks involved

Too often an organization may look to take a short cut and incorporate stand-alone language in a waiver for any and all activity authorized or conducted by them without any further explanation of the specific activities involved, risk being assumed, etc. As a rule of thumb, the participant must have a reasonable understanding of the activities involved, the risks being assumed, and the potential consequences of participation to effectively voluntarily waive their rights.

It is important that the waiver or release describes the nature of the event in enough detail regarding the activity involved and how vigorous it is and what physical conditioning, fitness, or skill level may be required. Potential inherent risks of the activity should be identified ranging from minor to potentially serious or catastrophic.

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The organization must provide enough time and opportunity for the releasing parties to read the document and understand the activity’s risks and liability assumed, ask questions, or voice concerns on the activity or the waiver being provided.

In this section we recommend the releasing party specifically affirm they know and understand the inherent risk of the activity, they appreciate the risk, and will agree to take responsibility and assume the risks involved.

Exculpatory or waiver language utilized

A well-written waiver will generally follow these recommendations for the exculpatory or waiver language section:

- Separate this section so it is distinct from other parts of the document and contains proper jurisdictionally specific (if applicable) language for a liability waiver in the event of provider negligence and/or injury because of the activity.
- Beneficial phrases in this section include, for example, “in consideration of...,” “I hereby release [Organization Legal Name and other related parties] from all claims,” a mention of “negligence,” etc.
- Clearly identify the protected parties using the correct legal name of the entity itself and associated administrative entities such as school boards and management, employees, volunteers, etc.
- Make clear the duration of the agreement or participation involved, such as “which may occur in present or future participation,” “for the duration of the event,” etc.

Indemnification section

Like the exculpatory or waiver language section, separate the indemnification section from the other parts of the agreement. This section is meant to transfer risk by requiring the signing parties to reimburse the organization for any monetary loss resulting from an injury to the participant or an injury or loss caused by the participant. Recommended phrases include “agrees to indemnify,” “reimburse,” “defend,” “hold harmless,” and “save harmless”. Clarify the language to include legal expenses such as attorney fees, court costs, and investigative costs.

The indemnity section provides the organization indemnity (protection) against the following:

- Claims made by the participant, parents, or others arising out of an injury to the participant, *and*
- Claims of co-participants, rescuers, and others arising from the conduct of the participant during participation.

Other considerations

Other important considerations include adding a severability clause in the event any part of the agreement is deemed to be void, it will have no effect on the remainder of the agreement, and a covenant not to sue in the event of injury or loss.

The release should contain information concerning code of conduct for the activity including an agreement to follow all safety rules and instructions as well as rules for the activity, e.g., agreeing to wear required safety equipment; following safety rules of the activity, facility, management, instructor; etc. It is also valuable to require the participant agree to inform management or an instructor of any conduct or condition that might endanger themselves or others.

Language in the document should also specify the venue, jurisdiction, and applicable state law.

Health/medical condition affirmation

As indicated in the “Do’s and Don’ts” section, it is important to understand the physical capabilities required for participation and obtain medical condition affirmation or clearance for every activity. The agreement should at least have affirmations regarding the health and sickness status of the participant such that the participant affirms there are no health problems that prevent participation. An affirmation that the participant has the skill and fitness level to participate safely in the activity is also recommended.

For longer-duration activities that require physical conditioning and practice, and for those activities with a greater chance of injury frequency and severity, especially head trauma, consider requesting information about the participant’s in-depth medical condition as well as the need for physician medical clearance to participate.

Since obtaining and utilizing individual medical information presents privacy issues governed by regulations such as Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Family Educational Rights and Privacy Act (FERPA), this information should be limited to those within the organization with a specific need to know. Involving qualified legal counsel is especially important for this consideration.

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An authorization for emergency medical care, such as permission for rendering first aid, is valuable to include. Similarly, the authorization of emergency services such as transportation and sharing of medical information with medical personnel may be prudent depending on the event or activity. It is important that the document expressly indicates the participant of the activity assumes the responsibility for all costs involved in addressing emergency situations resulting from the activity.

Minors

As mentioned previously, states vary concerning liability waivers involving minors. It is important for an organization to realize what a liability waiver involving a minor can accomplish in their jurisdiction(s) as well as having a document and process that adheres to jurisdictional requirements. As always, involving qualified legal counsel is strongly encouraged.

Generally, a waiver document involving a minor has the added importance of ensuring the reader fully understands the nature of the activity and the degree of supervision that will be provided. In some situations, parent or guardian participation may be a requirement of the activity. If this is the case this should be specifically spelled out in the document and emphasized in pre-event meetings and informational and promotional materials. Disclosing and understanding inherent risks and possible consequences of participation are important.

For an activity with many components or for an extended period of time, consider providing supplemental information like a detailed itinerary or informational flyers/brochures for each component. The waiver document should reference that additional information is being provided.

The waiver involving a minor needs to be a stand-alone document, not a modification or an extra addition to a document intended for adults to execute. The minor and parents/guardians should all be required to execute the document. Parents/guardians and child must all fully understand the activity and the risks being assumed and transferred for a waiver to be effective. All need to have the ability to ask questions about the activity or release and all attest that they voluntarily agree to its terms.

Waiver conclusion

The liability waiver typically concludes with a statement in which the signer affirms having read and understood the agreement.

The concluding statement should include an affirmation that the signer understands that he or she is relinquishing substantial legal rights, including the right of financial recovery for injury, whether the injury results from the inherent risks of the activity or from the ordinary negligence of the provider. It should also include an affirmation that the signer is voluntarily participating in the activity and is voluntarily signing the agreement with the full intent of releasing the provider of liability for injury or loss due to the inherent risks of the activity or due to the ordinary negligence of the provider.

Include space for the signature, the printed name of the participant, the date, and the name and phone number of an emergency contact person.

Summary

Liability waivers and releases are important tools that serve various functions. To be effective, careful thought, preparation, and resources are needed to create, apply, use, and execute waivers and releases. This is especially true for any nuances applicable in an organization's specific jurisdiction. Waivers should never be a substitute for fully considering and developing proper safety efforts for any activity. Involving qualified legal counsel is strongly encouraged.

References

1. USLegal®. *Waivers and releases*. Retrieved April 2019, from USLegal.com website: <https://sportslaw.uslegal.com/forms/waivers-and-releases>
2. Cotton, Doyice J. (2008, May). *Evaluating your liability waiver*. Retrieved April 2019, from Athletic Business website: <https://www.athleticbusiness.com/contract-law/evaluating-your-liability-waiver.html>

Additional resources

Cotton, Doyice J., & Cotton, Mary B. *Waivers and releases of liability*, 9th Edition. <https://www.sportwaiver.com>



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