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WHITE PAPER

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COVID-19 Waivers: The Benefits and the Pitfalls

When properly employed, liability waivers—contractual provisions by which one party agrees to relinquish the right to recover for certain injuries—can be an effective means of minimizing the risks arising from the transmission of COVID-19 in connection with company activities. While the enforceability of such waivers is governed by state law (and therefore varies), generally speaking, COVID-19 waivers are more likely to be enforced if they are conspicuous, clearly identify the claims being waived, and contain any language required by the applicable state.

Although waivers may not be enforceable against employees or others subject to specific protections, they may effectively protect against claims by customers, vendors, and other constituents, especially when joined with covenants not to sue, indemnification provisions, severability provisions, and policies and procedures designed to prevent the transmission of COVID-19. Companies considering COVID-19 waivers should be mindful of the associated business risks; while COVID-19 waivers are becoming more common, they have the potential to harm a business's relationships and image, especially in the consumer context. Put simply, COVID-19 waivers are a tool that companies should consider using as part of their response to the pandemic, but one that needs to be undertaken carefully, thoughtfully, and with precision.

Many businesses are resuming operations as governments lift the lockdown measures imposed in response to the coronavirus (COVID-19) pandemic. These businesses are facing renewed risks of liability arising from the transmission of COVID-19 in connection with company activities. Businesses of all sizes should be mindful of this risk and implement strategies to minimize exposure.

In addition to reviewing insurance coverage[1] and, to the extent reasonable, implementing safety procedures consistent with guidance from the Centers for Disease Control and Prevention and local health authorities,[2] liability waivers—contractual provisions by which one party expressly agrees to relinquish the right to recover for certain injuries—provide a potentially cost-effective means of minimizing the risk of liability from exposure to and transmission of COVID-19. Businesses may be able to protect against COVID-19-related liabilities by executing waivers through which customers, vendors, or other non-employee constituents prospectively relinquish their right to recover for COVID-19-related injuries. Such waivers can be joined with covenants not to sue and indemnification provisions to provide further protection from claimants who improperly pursue validly released claims.

Businesses can maximize the chances of a COVID-19 waiver being enforced by being mindful of the following core principles:

- **The enforceability of waivers is governed by state law**. While many states follow the same general principles, certain outlier states take an extremely negative view of pre-injury releases of liability (e.g., Montana and Virginia). Other states have statutes that need to be considered when drafting a waiver.[3] Still others have specific requirements or "magic language" that must be included in a waiver in order for it to be enforceable.[4] Understanding the specifics of your state law is critical to understanding whether waivers can effectively mitigate the risks facing your company.

- **Waivers are generally not enforceable with respect to gross negligence or intentional conduct**. Again, knowledge of your state's rules is critical, as some case law suggests that a waiver will not be enforced at all if it is written so broadly that it applies to both releasable and non-releasable claims.[5] One strategy for ensuring that a waiver covers as much conduct as possible without being so broad as to be unenforceable is to include language explicitly stating that the waiver "is intended to be as broad and inclusive as is permitted by law."

- **Waivers should clearly identify the claims being waived.** Many states only enforce waivers that expressly identify the legal rights being waived. In the COVID-19 context, that may require expressly stating that the waiver covers claims for injuries related to COVID-19, including claims based on the company's negligence. Indeed, some states take a critical view of waivers that do not explicitly mention the waiver of ordinary negligence claims.[6]

- **Waivers should be conspicuous.** The more conspicuous the waiver, the more likely a court is to conclude that the waiving party read it and understood it. Strategies for making a waiver conspicuous include setting it apart from other provisions, using a clear heading, requiring a separate acknowledgment, and using boldface font, capital letters, and/or other textual effects to draw attention to the provision. Businesses should also consider including language at the top of a waiver stating something akin to "READ CAREFULLY – SIGNING THIS DOCUMENT AFFECTS YOUR LEGAL RIGHTS."

- **Waivers from employees are of questionable value and may do employers more harm than good.** For employers in most if not all states, there is little utility in seeking prospective waivers of liability from their employees. All states have workers' compensation schemes, which typically preempt common law claims for workplace injuries and provide the exclusive remedies (with certain exceptions) for such injuries.[7] Employees usually cannot prospectively waive their right to file workers' compensation claims, either because the statutory text prohibits such waivers explicitly or because courts deem such waivers unconscionable or void as a matter of public policy.[8] While workplace injuries caused by an employer's intentional acts are sometimes excluded from workers' compensation coverage, waivers are typically not enforceable with respect to intentional conduct, as noted above. Additionally, prospective waivers of an employee's right to pursue most statutory employment claims (including the right to file an administrative charge) under Equal Employment Opportunity laws and the National Labor Relations Act are not permissible, either.[9] Further,

there is some risk that asking employees to sign such waivers will cause employees to question their employer's efforts to maintain a safe workplace during the pandemic, which could result in complaints to the Occupational Safety and Health Administration or its state counterparts.

- **Many courts are hesitant to enforce waivers that distort the terms of a "special relationship" or seek to waive the rights of minors.** Such waivers are often seen as contrary to public policy. Although there is some variation by state, this category of unenforceable waivers may include waivers executed by employees in favor of employers and waivers executed by residential tenants in favor of landlords.

- **Waivers should be used in conjunction with, not in lieu of, other recommended COVID-19 mitigation efforts.** Even in states that are open to enforcing prospective waivers, there is no guarantee that a COVID-19 waiver will be enforced. Accordingly, to minimize their risk of liability to the greatest extent possible, companies should use waivers in combination with other strategies aimed at reducing the spread of COVID-19.

Waivers that comply with these general principles may help protect a business from significant liability risks associated with COVID-19. Further, even if a waiver is unenforceable, it may bolster an argument that the plaintiff assumed the risk of COVID-19-related injuries—another possible defense against COVID-19 claims. In most cases, any negative legal consequences following from the inclusion of an unenforceable waiver may be addressable via a properly drafted severability provision.[10]

But, for many companies, the legal answer is the not the final answer, as business risks must be considered. In the context of waivers—especially for customers—a company must evaluate the potential harm to relationships or brand that can result from requiring a release of rights, for example, to come into a movie theater or shopping mall. News reports suggest that COVID-19 waivers are becoming more common, and all signs suggest that trend will continue. Whether that lessens the potential harm that might result from instituting mandatory waivers is something every business should consider before deciding whether COVID-19 waivers should play a role in their overall COVID-19 response.

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ENDNOTES

1 *See Policyholders Should Anticipate and Prepare to Defeat Insurer COVID-19 Coverage Denials*, Jones Day Commentaries (March 2020); COVID-19 and Business Insurance, Jones Day Talks® (March 2020).

2 *See Is COVID-19 Guidance a Sword or Shield in Regulatory Enforcement and Litigation?*, Jones Day Commentaries (May 2020).

3 *See, e.g.*, Cal. Civ. Code § 1542 (providing that a general waiver does not extend to unknown or unsuspected claims).

4 *See Sirek v. Fairfield Snowbowl, Inc*., 800 P.2d 1291, 1295 (Ariz. Ct. App. 1990) (collecting cases requiring waivers to include the word "negligence").

5 *See, e.g.*, *Jesse v. Lindsley*, 233 P.3d 1, 8 (Idaho 2008); *Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc*., 163 S.W.3d 910, 913 (Mo. 2005).

6 *See Sirek*, 800 P.2d at 1295 (collecting cases).

7 *See*, *e.g.*, Illinois Workers' Compensation Act, 820 ILCS § 305/5(a) (providing that an employee shall have no "common law or statutory right to recover damages from [an] employer" for any "injury . . . sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided [by the IWCA]."); 820 ILCS § 305/11 (providing that "[t]he compensation herein provided, together with the provisions of this IWCA, shall be the measure of the responsibility of any employer").

8 *See, e.g.*, 820 ILCS 305/23 ("No employee, personal representative, or beneficiary shall have power to waive any of the provisions of this Act . . ."); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989) (explaining that "exculpatory agreements between employer and employee . . . are generally held invalid" as contrary to public policy (citing Restatement (Second) of Torts § 496B (1965))).

9 *See*, *e.g.*, *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII."); 29 U.S.C. 626(f)(1)(C) (providing that employees cannot waive prospective rights under ADEA); *U-Haul Co*., 347 NLRB 375, 388 (2006) ("The Board has regularly held that an employer violates the Act when it insists that employees waive their statutory right to file charges with the Board . . . .").

10 For example, a severability provision may state: "If any part of this [Release of Liability] is held to be invalid or legally unenforceable for any reason, the remainder of this provision shall not be affected thereby and shall remain valid and fully enforceable."