

## Using Waivers of Liability to Protect Your Business During COVID

As Colorado continues to transition from “Stay-at-Home” to “Safer at Home,” businesses across the state are faced with the challenge of reopening amidst the ongoing COVID-19 pandemic. In addition to assessing the various civic and ethical responsibilities attendant to opening for business during a global pandemic, business owners are also navigating very practical financial and operational hardships stemming from government directives at the federal, state, and often local levels. Of course, all businesses want most of all to be able to assure employees and customers that they are operating safely. However, in the face of stark, often daily, reminders that the World’s infectious disease and public health officials still know so little about COVID-19, business owners need also consider utilizing contractual liability waivers to help protect their business from the financial exposure of an unintended and perhaps, unpreventable, transmission of the virus on their premises.

Liability waivers generally serve to limit a business’s exposure to personal injury lawsuits brought by customers. In Colorado, they are most notably used to protect businesses offering access to the State’s many outdoor recreational activities. In the midst of today’s COVID-19 crisis, an enforceable liability waiver may also serve to protect any business facing the risk of its customers contracting the virus while visiting its premises or through interacting with its employees or products.

Picture the following situation: A customer, excited to venture to a retail store for the first time in eight weeks, enters. He examines the store merchandise, purchases an item, and leaves. Perhaps he speaks with a store employee while there. Ten days later, the customer is diagnosed with COVID-19. He sues the store, claiming he contracted the virus while shopping there because the store failed to implement or follow appropriate safety guidelines – which, frequently change and often differ from one city to another.

This situation can be mitigated, or even prevented, if the customer signs a carefully crafted liability waiver. Generally, Colorado Courts enforce waivers that are “sufficiently clear and unequivocal.” *Jones v. Dressel*, 623 P.2d 370, 375 (Colo. 1981). The parties’ intent to release liability must be obvious from the waiver’s language. In evaluating a waiver’s enforceability, courts consider four factors: “(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.” *Id.* at 376. When it comes to the enforceability of COVID-19 waivers, the third and fourth factors will be critical.

In considering the third factor, courts have enforced waivers where the customer “was free to walk away” from the activity. *Raup v. Vail Summit Resorts, Inc.*, 233 F. Supp. 3d 934, 943 (D. Colo. 2017). A meaningful opportunity to decline, therefore, is significant in whether the parties fairly entered into the waiver. This also has implications for the first and second factors. Courts should enforce waivers signed by customers before entering business offering “non-essential” services e.g., hair salons, gyms, movie theaters, bowling alleys, etc. Those customers may just as readily decline to patronize such business, as sign a liability waiver in order to do so. On the other hand, courts may be more reluctant to enforce waivers signed by customers before entering

“essential” businesses e.g., grocery stores, financial institutions, law firms, health care providers, etc. Customers may simply have no alternative but to sign the waiver in order to provide groceries for their families, or to obtain such essential services.

As to the fourth factor, a waiver should use clear language, carefully tailored toward the risks of COVID-19. Vague language alerting customers to a general risk of contracting diseases or becoming ill is not likely to satisfy this requirement. For example, an enforceable COVID-19 waiver should, without limitation, set forth: a description of the virus’s symptoms; an explanation of how the virus may be transmitted; an explanation that individuals may asymptotically carry and transmit the virus; and confirmation that the customer is voluntarily and knowingly assuming the risk of contracting COVID-19 by an act or omission of the business, an employee, or another customer.

Importantly, waivers cannot be used to release a business from willful and wanton conduct; they are limited to simple negligence. *Jones*, 623 P.3d at 376. For this reason, businesses must still require their customers to wear face masks in cities where it is required to do so, and enforce social distancing and hygiene protocols among their customers and employees. The failure of a business to do so could be deemed willful and wanton conduct and result in liability exposure even where a waiver had been signed.

The COVID-19 crisis, and its related government directives, change daily. Businesses should remain aware of other developments which may affect liability. For example, Congress is exploring whether to include protection for businesses as part of the next stimulus package. In the meantime, liability waivers – carefully crafted to fit a business’s particular model and operation – will help to protect against COVID-19-related lawsuits.