



Do Employers Need COVID-19 Waivers?

Employers who are considering resuming their operations (or employers who have already resumed operations) should consider the benefits of putting in place a COVID-19 waiver for employees and visitors. This can be effective for employees who decide to voluntarily return to work. Such a waiver could limit the employer's liability in the event an employee or a visitor contracts the coronavirus in connection with the employer's business activities.

I. Legislation On Liability Protection

At the federal level, liability protection during the pandemic is a hotly debated issue and has been included as part of the next COVID-19 relief bill. As of this writing, the coronavirus relief bill floated by Republicans, called the HEALS Act (the Health, Economic Assistance, Liability Protection and Schools Act), includes liability protections to create a safe harbor for businesses, schools, hospitals and nonprofits who follow government guidelines in good faith. It is unclear whether liability protection in the HEALS Act will survive negotiations with Democrats. The HEROES Act (the Health and Economic Recovery Omnibus Emergency Solutions Act), approved by House Democrats in May, is their preferred starting point for negotiations, and did not include liability protection.

As this issue is considered at the federal level, some states have passed COVID-19 laws to limit the liability of health care workers and/or businesses. Such laws generally provide immunity from liability related to COVID-19 if an employer acts in good faith with federal, state, or local guidance, and is not negligent. The extent of the protection varies by state. The approach by some states is to protect health care providers, while other states also protect businesses. Further, the governors of several states have also issued executive orders limiting liability of health care providers and some businesses.

II. When is a Waiver Needed

A waiver is recommended for:

- Employees who return to work voluntarily,
- Individuals who attend a meeting at the employer's location, or
- Individuals who attend a meeting sponsored by the employer that is held off-site.

When used for employees, the waiver language should certify that: the employee's decision to return to work is voluntary; no pressure was placed on the employee to enter the workplace; the employee has received instructions from the employer regarding safety; and the employee agrees to follow the safety guidelines established by the employer which should include the guidelines issued by Centers for Disease Control and Prevention (CDC), and state and local authorities. If used for visitors, an employer should carefully consider whether the use of a COVID-19 waiver could potentially harm business relationships. If the employer elects to have visitors sign a waiver, it should certify that the visitor voluntarily entered the premises, has received safety instructions from the employer, and agrees to comply with the employer's safety instructions which include the guidelines issued by the CDC, and state and local governments.

III. Drafting a Waiver

Whether for employees or visitors, waiver language should be carefully drafted so that it is narrowly tailored to the employer's business. It should clearly state that the employee's or visitor's presence is voluntary and that they understand the risks. It should also make clear that no pressure has been exerted to coerce the employee or visitor to enter the premises. The waiver should make it clear that employees and visitors must comply with policies and procedures enacted by the employer to safeguard the health of everyone in the office or attending the meeting. The waiver will only be effective if it is used by the employer as part of its comprehensive COVID-19 mitigation strategy designed to reduce the spread of the coronavirus in the workplace. A waiver signed by an employee or visitor will not be effective if the employer is not taking all required steps to safeguard against coronavirus transmission in the workplace and ensuring that anyone entering the workspace complies with the employer's safeguards.

The language should be clear, unambiguous, easily understandable and conspicuous. Waiver language can be made conspicuous by setting it apart from other provisions, appearing in bold type and/or capital letters. The conspicuous text will help support the notion that the waiving party read and understood the import of the language.

NOTE: Should it become necessary for an employer to call back only a portion of its entire population of employees to work, the employer should examine the population being asked to return to work through the lens of discrimination. In other words, the employer should consider whether, for example, these employees are mostly or all women, older, Black, Indigenous, or persons of color, in order to avoid any potential discrimination or unconscious bias claims against it.

It is very important to keep current copies of the COVID policies and procedures with the waivers so that everyone understands their responsibility to comply. The policies and procedures should, at a minimum, comply with current CDC, state and local guidelines.

Waivers could be invalidated if employers do not comply with: (i) their own policies and procedures to safeguard employees and visitors in the workplace, or (ii) CDC, state and local guidelines.

IV. Updating Waivers

As this pandemic continues to evolve, it may become necessary to update the waiver from time to time. It is very important that the waiver reflect CDC, state and local guidelines.

Waivers should be updated even after a vaccine becomes available and employers should continue to collect them. It may take several months to know whether the vaccine is effective. Even then, it will take time for enough people to be vaccinated before the environment is safer.

V. Conclusion

Because liability waivers in the context of a pandemic is a new area, it is unclear whether courts will enforce the waiver if challenged. However, a signed waiver may help demonstrate, at a minimum, that the employee not only understood the risks of returning to work, but accepted the risks. Employers will benefit from documenting the waiver process as well as steps taken to create as safe an environment as possible.

We have prepared a variety of COVID-19 waivers for our clients. Please contact us if you need help with your COVID-19 waiver.

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