

Fact Sheet

Waivers and Releases

A program sponsor might request that participating volunteers or other participants sign a waiver. A “waiver” or “release” (the terms, although having some legal distinction, are commonly used interchangeably) is an agreement by an individual to relinquish a legal claim against the party that causes an injury. Although a waiver or release is occasionally implied from an individual's behavior (for example, engaging in an obviously hazardous activity such as skydiving), the term is customarily used with reference to an express or written agreement.

Liability waivers are valid only if they are entered into:

- knowingly; and
- voluntarily.

In addition, the party that waives liability must receive something in exchange. Few attempted waivers satisfy these standards. Courts often find that arrangements are not voluntary when they are between an individual and an organization because of the unequal bargaining power. In recognition of the bargaining disparity, employees usually cannot waive their right to bring an action against their employers. Moreover, waivers for certain types of activities are held void as against public policy. Courts also frequently invalidate waivers on the grounds that the individual did not fully appreciate the rights being waived or that the waiver did not specifically indicate that it covered liability for negligence.

Humorist Dave Barry's parody of a waiver goes overboard to show voluntary acceptance of the fully understood risks of skiing.

The undersigned agrees that skiing is an **INSANELY DANGEROUS ACTIVITY**, and that the rental personnel were just sitting around minding their **OWN BUSINESS** when the undersigned, who agrees that he or she is a **RAVING LOON**, came **BARGING IN UNINVITED**, waving a **LOADED REVOLVER** and demanding that he or she be given some rental skis for the express purpose of suffering **SERIOUS INJURY OR DEATH**, leaving the rental personnel with **NO CHOICE** but to . . .

Dave Barry, *Dave Barry Turns Forty* (Fawcett Columbine, New York 1990).

Despite their legal vulnerability, if properly drafted and executed, waivers can block liability. Moreover, *an individual who has signed a waiver may be less likely to initiate a lawsuit than*

someone who has not. A waiver may also assist an organization in asserting the legal defense of “assumption of the risk” in some states, i.e., that the individual proceeded with the activity despite being aware of the risks, and therefore should not be permitted to receive damages.

The validity of a waiver may depend on when it is executed. Those executed before any actual damages occur are more tenuous than those executed after an injury has occurred (commonly but not uniformly referred to as “releases”). Waivers written before any damages actually occur generally seek to establish that the individual recognizes the risks involved in a forthcoming activity and voluntarily consents to accept the consequences of those risks in exchange for the opportunity to participate. Whether a court will enforce such a “before the fact” waiver is highly dependent on the circumstances involved in each case. If the individual has no practical choice but to sign the waiver, the likelihood of its being upheld is slim. In light of the dubious legal status of “before the fact” waivers, and in the interest of encouraging employee volunteerism, some organizations have expressly decided not to use them.

Waivers executed after an injury are on much more solid legal ground because the value of the exchange is less speculative. Such waivers are often executed in conjunction with a settlement arrangement. In either event, legal counsel should be consulted in drafting such agreements. The law governing waivers varies widely from state to state and some states prohibit their use in certain situations.

Disclaimers

A “disclaimer” is an express disavowal, repudiation or limitation of liability by one party to a transaction. Disclaimers differ from waivers in that they are unilateral; the injured party does not explicitly agree to the liability limitation. As such, they are of limited legal value. Their principal functions are to refute assertions about extra duties that a program has taken upon itself and to apprise potential claimants of relevant program limitations.

The disclaimer may indicate, for example, that the sponsor does not intend to provide security personnel for an event and is not assuming a special duty of care for the safety of volunteers during the event. Similarly, a clearly-posted disclaimer of liability for harm from using athletic equipment that an organization provides pursuant to a sports program may counter any assertion that the organization assumes a special duty of care for the safety of the participants. In this sense, a disclaimer is roughly equivalent to an advisory or warning of risks that an individual may choose to accept or avoid. Regardless of legal effect, disclaimers, like waivers, may deter claims.

Hold-harmless agreements

A “hold-harmless” agreement operates a little differently from a disclaimer or waiver but serves the same function of protecting a nonprofit’s assets. Rather than seeking to bar a lawsuit, a hold-harmless agreement obligates one party to pay any costs the other incurs as a result of a lawsuit.

Properly drafted by an attorney, a “hold-harmless” agreement may be better than standard indemnification because the party bound by the agreement may be obligated to pay expenses as

they arise rather than reimbursing expenses after they have been paid. Furthermore, the agreement is presumed to apply comprehensively to all costs for which the other party would be held liable including, for example, the legal costs of responding to and defending against a claim as well as the payment of any damages ultimately awarded to the claimant.

Because a hold-harmless agreement does not foreclose a lawsuit, its practical value is limited by the ability of the executing party to pay expenses that do arise. A hold-harmless agreement from an entity with no assets and no insurance is nearly worthless.

For this reason, hold-harmless agreements are frequently conditioned on proof of insurance coverage. The entity promising to pay must provide proof that it has insurance to cover any claims that may arise. For complete protection, the insurance policy must include coverage for liability assumed under contract. As a fallback position, a certificate of insurance will at least verify that the entity carries insurance up to some specified limit. If primary liability is likely to be assessed against that entity rather than the organization, this certificate provides almost as much assurance as a hold-harmless agreement.

Indemnification

An organization may seek to protect its directors' personal assets by indemnifying them. Through indemnification the organization undertakes to pay legal costs, settlements and judgments on its directors' behalf. *Indemnification can be an empty promise, though, if the organization does not have enough money to pay those expenses.* Organizations that rely on government grants or contracts may not be permitted to use those funds for indemnification. For most organizations, indemnification is meaningful only if combined with D&O insurance.