

From the law firm of Pitbaldo LLP;

We have now prepared two waivers, as requested. One waiver is intended for operators; the other waiver is intended for tour operators. You can differentiate them by their file names and you will see the preamble in the second paragraph of each waiver is slightly different.

I wanted to pass along some additional guidance, to help you understand and implement the waiver. I appreciate that different businesses have different considerations, and so it may be for various reasons difficult for each business to implement these waivers on an “as-is” basis. So, hopefully this guidance will assist with that.

The waiver is a balance between something that is 20 pages and offers maximum protection versus something that is shorter and easier to implement. The challenge is to include what needs to be included, but to use language people can understand and to avoid overwhelming them with pages and pages of text. We have also tailored the waiver so that it applies to COVID-related liability, only. This will help assist with enforceability because the waiver is not having passengers waive other, unrelated liability. If a business already uses waivers, then they can build this waiver into that process.

To assist with understandability, the waiver includes all caps text, which spells out the key points at the beginning of each paragraph. The third, fourth and fifth paragraphs are the key ones. The third paragraph is an assumption of risk – the person agrees that travelling on a coach these days involves risk. The fourth paragraph is a release – the person agrees they won’t go after the operator/tour operator (and the other “Releasees”) for any COVID-related harm, because they rode on a coach (we could include all communicable diseases, but that becomes overbroad and weakens the waiver’s enforceability). The fifth paragraph is an indemnity – the person agrees to compensate the operator/tour operator for any harm that is suffered because the person exposed others to COVID. Put together, the assumption of risk, release and indemnity are the key aspects of the waiver.

As I mentioned, this represents the “gold standard”. If it is too long to implement, then a business could consider a shorter waiver and a reference to this waiver, in that waiver. As we discussed in the webinar, waivers are often attacked on the basis that they were not brought to the attention of the person who is trying to avoid enforcement of the waiver. So, how the waiver is presented to the passenger is key. It depends in part on how the ticket is sold and there are a variety of options:

- Provide the full waiver, in paper and ink, and have it signed.
- If the person buys a ticket online, have the waiver pop up, and require the person to scroll through its terms before taking positive action to accept its terms (typing their name and clicking “I accept”, or clicking a box to show acceptance).
- Also for online purchases, you could indicate the purchase of tickets is subject to terms and conditions, including a waiver, and include a link to the waiver. Again, have the person do something to accept the terms, rather than simply having the link available.
- For in-person purchases, the person could be given the full waiver, in paper and ink, and be asked to sign it.
- If purchases are made at a touch screen or a terminal, the person could be shown the terms of the waiver and asked to click on the screen to indicate their acceptance of its terms.
- Or, the person could be given a ticket, which indicates it is subject to terms, including the waiver. Include a link to a URL which contains the waiver, on the ticket.

- Include signage at places of business, on coaches, etc., which references the waiver (either in full or in part, with a URL link to the full waiver).
- Include the waiver as part of the general terms and conditions of carriage that might be posted on the business's website.

For online purchases, language which indicates that clicking or typing the person's name is the equivalent of their signature, would be prudent. The person should also be given the option of having the text of the waiver emailed to them, or to have a link texted to them, just as they might be sent a PDF of a ticket. Businesses may already implement some or both of these features, if they take purchases online.

The more advance notice of the terms the person can be provided, the better. We want to avoid giving them the waiver on the steps of the coach, if possible.

A business will want to ensure that all original, executed waivers are saved in a safe place, so that they can be used if needed. The same point goes for electronic waivers – the system used should ensure the waivers are time-stamped and saved in a way that preserves their integrity and shows they were not altered.

At the end of the day, a paper and ink waiver, physically signed by the person, is ideal for proving the person was aware of and accepted the waiver's terms. But given the way businesses operate, that might not be feasible. So, providing more opportunities to give notice of the waiver will assist with proving the passenger: (1) was aware of and understood the waiver; and (2) accepted its terms, which therefore increases the likelihood that the waiver will be enforceable. It would be advisable to implement any number of these approaches, rather than only one option, in isolation.

On the waiver, you will see some blank spaces, highlighted yellow. The first blank in the second paragraph is where the business would insert its name. The second blank, just above the signature, is where the business would insert its province of jurisdiction.

A waiver doesn't have to be witnessed; we just use witnesses to aid with proving the person signed the document.

The last signature block is for minors. In Canada, contracts with minors are "voidable" at the minor's option, which means you would have a parent or guardian sign the contract on behalf of the minor. If the passenger is an adult, this can be left blank.

Some COVID waivers (and other waivers for that matter) include reference to preventive measures that are taken by the business. We have not done that because if we set out preventive measures and then the business doesn't take them, that weakens the waiver's enforceability. Businesses should of course take these measures; they just don't need to be explained in the waiver.

We also didn't address consumer protection laws and laws regulating travel. These laws already apply to the businesses and they do not specifically impact this waiver. On that point, some businesses may already have waivers and this document could be built into that process.

Another point that is left unsaid is whether the passenger must have knowledge they are COVID positive, in order for the indemnity to apply for any harm they cause. We do not address knowledge and so on the face of the waiver, knowledge would not be relevant (i.e., you agreed to indemnify us,

regardless of whether you knew you had COVID, or not). If we wanted more certainty we could say that the passenger “knowingly or unknowingly” was positive, but that might start to look like an unconscionable (and unenforceable) waiver. Like other agreements, knowledge only becomes relevant if we mention it; by staying silent, then whether or not the passenger knew they were positive will not matter.

As we discussed on the webinar, a waiver is a tool but never a complete solution or guarantee of success. There are always risks, and as we know, a waiver provides a defence to a lawsuit but does not prevent a lawsuit from being filed (or negative PR). Businesses should do whatever they can to take the preventive measures that are identified by government and public health agencies, as they are updated from time to time. That will also help ensure the waiver is enforceable, if it is needed.

I trust this will be helpful, but please let me know if you have any follow-up questions or comments.

Thanks!

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