



CAN A CUSTOMER SUE YOUR BUSINESS AFTER CONTRACTING COVID-19? – MITIGATING RISK IN A PANDEMIC

May 7, 2020 | Alert

You are a small business owner, and you are allowed to re-open your business after the state's stay-at-home order is lifted. You carefully follow every recommendation from the Centers for Disease Control and the state public health agency. Yet, you worry that a customer will blame and sue your business if, after visiting, they contract COVID-19.

As of the date of this article, litigation by customers alleging negligence by business owners for exposure to COVID-19 does not appear to have spread beyond the cruise line industry—the firm has written about related class-action cases here. But, whether a business can prospectively limit this liability through a waiver is a common question we are receiving, and, given the uncertainty as to what litigation COVID-19 will generate, a fair one.

If you own or operate a business, the following points should guide whether you ask your customers to assume risks and waive your business' liability relating to COVID-19:

- **Applicable Law.** In Illinois, "exculpatory waivers" can be enforceable as long as they are carefully drafted, and the business did not engage in willful or negligent conduct well beyond that of a reasonable business. Waivers should be clear and specific in order to put the signing party on notice of the range of dangers for which he or she assumes the risk of injury—here, they should explicitly mention COVID-19. Yet, based on the current state of the law—courts, of course, have not yet applied exculpatory waivers against the novel coronavirus-related claims—it is unclear whether liability waivers related to COVID-19 will be enforceable, including whether or not they are contrary to public policy. This should not prevent businesses from considering them, given their ease of administration and the potential to eliminate significant liability.

RELATED PROFESSIONALS

Rachel E. Bossard

Joshua J. Cauhorn

RELATED PRACTICE & INDUSTRIES

Corporate

Labor and Employment

Litigation



- **Responsible Practices.** Regardless of whether you consider having customers sign a waiver, the importance of following all social distancing and sanitation guidelines from federal and state authorities cannot be emphasized enough. Most significantly, these measures protect all of the members of your business community. And, it constitutes good business practice, both for maintaining your reputation and limiting liability. Not following government rules could needlessly expose your business to potential liability and compromise the safety of the public.
- **Practicality.** How practical is it for you to ask your customers to sign a waiver before entering? If you have a high volume of customers shuffling through your business, it may not be. But, if you service an organized, successive list of customers throughout the day—think a hair salon—then it makes sense to consider a liability waiver. Consider using an app-based platform that can leverage customers' smartphones for a no-contact way to have waivers signed and electronically stored, such as DocuSign.com or smartwaiver.com (be sure to confirm with counsel in advance that the platform generates enforceable electronic agreements under state law).

The attorneys at Burke, Warren, MacKay & Serritella, P.C. continue to advise businesses in several industries on COVID-19-related issues, including waivers. Contact our attorneys, including to discuss the efficient drafting and implementation of COVID-19 exculpatory waivers.