



# COVID-19 Liability Waivers for Businesses

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As Wisconsin begins reopening its economy in the wake of COVID-19, many businesses are concerned about whether, and to what extent, a business may be held financially responsible if a patron becomes ill due to interacting with a business. As a result, businesses may contemplate whether they can shield themselves using liability waivers.<sup>1</sup>

This issue brief discusses Wisconsin case law that would apply to liability waivers barring patrons from suing businesses if a patron contracts COVID-19 at a business. While liability waivers are common across all states, each state interprets and upholds waivers based on differing standards. Current case law indicates that Wisconsin courts are skeptical of liability waivers and have generally refused to uphold them.

## ENFORCEABILITY OF LIABILITY WAIVERS IN WISCONSIN

Wisconsin courts analyze liability waivers based on contract law and public policy. While Wisconsin courts look holistically as to whether a waiver is fair and understandable to signers, courts generally distill this analysis into three key considerations. Specifically, courts consider whether the liability waiver: (1) communicates the nature and significance of what is being signed; (2) is overly broad; and (3) offers an opportunity to negotiate.

### Nature and Significance

For the first consideration, courts determine whether signers simply sign liability waivers without understanding what they are waiving. Courts have consistently held that businesses must ensure that a liability waiver, in its entirety, clearly communicates the “nature and significance of what is being signed.” To determine whether a waiver does so, courts consider both the visual nature and the content of the waiver.

For example, the Wisconsin Supreme Court invalidated a waiver that was in a block of homogenous text: the body was all in capital letters and in the same font size and color. Further, the waiver was in a packet of documents, including items such as a photo release and a member registration form, but the entire packet only required one signature which applied to all the agreements, including the liability waiver. The Court concluded that due to these visual characteristics, the waiver did not communicate the nature and significance of what the person signed. [*Atkins v. Swimfest Family Fitness Center*, 2005 WI 4.]

In another instance, the Court invalidated a waiver because the waiver never mentioned the word “negligence,” and instead relied on the signers to infer the waiver of negligence claims. The Court noted that the waiver’s imprecise language did not communicate the nature and significance of what the person signed. [*Yauger v. Skiing Enterprises, Inc.*, 206 Wis. 2d 76 (1996).]

In contrast, the Wisconsin Court of Appeals upheld a waiver that was visibly readable and contained generally understandable content. Visually, the waiver was on its own sheet of paper, separate from another form, and was broken up into six numbered paragraphs. The waiver was also signed prior to the activity, which indicated the waiver’s significance. In addition, the waiver’s content was clear: the waiver used the word “negligence” repeatedly and contained a final paragraph that confirmed the signer had read the release and understood its content. [*Werdehoff v. General Star Indem. Co.*, 229 Wis. 2d 489, 600 N.W.2d 214 (Ct. App. 1999).]

## Overly Broad

For the second consideration, the court analyzes whether the liability waiver is overly broad and all-inclusive. Courts have noted that overly broad waivers exacerbate the one-sidedness that generally exists between parties to a liability waiver. Generally, courts are concerned that waiver signers waive more than a signer realizes, which would further this one-sidedness.

For example, the Wisconsin Supreme Court invalidated a waiver that barred liability for virtually any act. The waiver waived liability for intentional, reckless, *and* negligent behavior. The waiver also waived liability not only for defendants but also for a separate company, its affiliates, and its subsidiaries. Further, it waived liability for any of the signer's injuries, even if the injuries occurred in a non-work vehicle. Therefore, the Court found that the waiver was unreasonably favorable to the defendant because it was overly broad. [*Richards v. Richards*, 181 Wis. 2d 1007.]

## Opportunity for Negotiation

Finally, courts consider whether the signer of a liability waiver had an opportunity to bargain or negotiate the terms of the liability waiver. Courts emphasize that the form itself must provide this opportunity to bargain. To date, courts have not clarified what would constitute an opportunity to bargain because most waivers have failed at least one of the considerations described above.<sup>2</sup> [*Richards*, 181 Wis. 2d 1007 at 1016; *Atkins*, 277 Wis. 2d 203, ¶¶ 17-18; see Alexander T. Pendleton, "Recreational Liability: Plaintiff-Friendly Standards Remain," Wis. Law., 2017, at pp. 28 and 34.]

## OTHER CONSIDERATIONS

While Wisconsin courts' stance on liability waivers has been consistent for decades, COVID-19 could have an effect on liability waiver jurisprudence. It is impossible to predict, but the novel nature of COVID-19 could cause the courts to more narrowly or more broadly weigh the current public policy considerations regarding waivers.

Other statutory grants of immunity may also apply to some businesses. Statutes grant certain immunities from civil liability in certain circumstances, with some immunity provisions created in direct response to the court holdings regarding the validity of liability waivers. These grants of immunity range from narrow grants, such as to equine activities or ski patrol members, to broad grants, such as to certain recreational activities. [Subch. II, ch. 895, Stats.; see Ralph C. Anzivino, "The Exculpatory Contract and Public Policy," 102 MARQ. L. REV. 747 (2019).]

It should be noted that liability waivers do not protect businesses from employee-related actions. Further, liability waivers do not protect businesses from Occupational Safety and Health Administration (OSHA) regulations, which, if violated, may result in fines and other action. [See Legislative Council, *Worker's Compensation and Third-Party Liability for COVID-19*, Issue Brief (June 2020); OSHA, *Control and Prevention*, Dept. of Labor, <https://www.osha.gov/SLTC/covid-19/controlprevention.html>; OSHA, *Enforcement*, Dept. of Labor, <https://www.osha.gov/enforcement>.]

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<sup>1</sup> See Mary Kate McCoy, "Liability Waivers For COVID-19 Are Popping Up Everywhere. What Do They Mean?" Wisconsin Public Radio (June 22, 2022), <https://www.wpr.org/liability-waivers-covid-19-are-popping-everywhere-what-do-they-mean>.

<sup>2</sup> "Opportunity to bargain" has been used in relation to contracts of adhesion. See *Wisconsin Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶¶ 52-53, 290 Wis. 2d 514, 714 N.W.2d 155; *Katze v. Randolph & Scott Mut. Fire Ins. Co.*, 116 Wis. 2d 206, 341 N.W.2d 689 (1984).