

Liability Shields

Waivers

A waiver is the intentional act of relinquishing a known right, claim, or privilege, such as the right to sue an organization for its alleged misconduct. Therefore, a waiver removes the potential liability from the party that could be held responsible for harm. Although an individual's behaviour (for example, engaging in an obviously hazardous activity such as sky-diving) occasionally implies a waiver or release, the term usually refers to an express or written agreement.

Liability waivers are valid only if the person enters into the agreement knowingly and voluntarily and if the person waiving certain rights receives 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 unequal bargaining power. Courts often invalidate waivers on the grounds that a participant did not fully appreciate the rights being waived or that the waiver did not specifically indicate that it included the organization's liability for negligence.

While programs serving young people often use waivers, it is important to remember that minors do not have the capacity to sign contracts. Most courts will strike a waiver signed by a minor.

Despite their legal vulnerability, if properly drafted and executed, waivers may help 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 defence of "assumption of the risk." This defence asserts that the individual proceeded with the activity despite being aware of the risks, and therefore should not be permitted to receive damages. An organization should consider using a participant waiver in any event where the nonprofit can identify the persons participating in the activity prior to the event. However, often such waivers do not absolve the nonprofit from liability for injuries directly caused by its negligence. Furthermore, waivers are not an appropriate substitute for the careful supervision of an organization's activities.

The validity of a waiver may depend on when the person executed it. Those executed before any actual damages occur are more tenuous than those executed after an injury has occurred (commonly 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. The circumstances of each case determine whether a court will enforce such a "before the fact" waiver. If the individual has no practical choice but to sign the waiver, it is unlikely that the court will uphold it.

Waivers executed after an injury are on much more solid legal ground because the value of the exchange is less speculative. Claimants often execute such a waiver in

conjunction with a settlement arrangement. *In either event, consult legal counsel when drafting such agreements.*

Informed Consent

An informed consent form does not attempt to excuse an organization from responsibility for its own negligence. Instead, the form seeks to relieve the nonprofit from liability for the inherent risks of an activity itself. An informed consent only relieves the organization for those risks that the organization reveals to the participant — there is no protection for risks not clearly identified in the consent form. Therefore, the form must apprise the participant or the parents/guardians in detail of the specific risks involved in the activity. The signer acknowledges that he or she has *read and understood* the risks involved and agrees not to bring suit for any harm resulting from the identified risks.

The keys to an effective informed consent are the identification and explanation of the risks inherent to the activity. An inherent risk is one that is essential to the nature of the activity. Skiing includes the inherent dangers of changing weather conditions, natural obstacles such as trees and rocks, and the possibility of severe injury resulting from a fall. An informed consent form would list these and any other recognized inherent risks of the activity. If the form does not identify a specific risk, the participant retains the right to seek redress from the organization for the harm caused by the unidentified risk.

Permissions Slips

Nonprofits should consider the use of permission slips for any activity involving a minor or other persons not legally competent to sign a waiver or informed consent. A permission slip does not absolve the organization of any liability but offers some protection. A well-drafted permission slip indicates the parents' or guardian's knowledge and consent for their child to participate in the activity. When parents are informed by the nonprofit informs about the nature and extent of the activity, they may feel more involved in the decision-making process. Also with a permission slip, the parent or guardian cannot claim convincingly that the organization infringed upon their authority, control, or custody over the child.

Permission slips, like informed consents, must explain clearly and fully the nature of the activity. A trip to the zoo could include a visit to the animal petting section, and this may be important information to a parent of a child with allergies. The more parents know, the less likely they are to claim that "had I known, I would not have let my child participate."

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 will not provide security personnel for an event. Therefore, the sponsor is not assuming a special duty of care for the safety of event volunteers. Similarly, a clearly posted disclaimer of liability for harm from using athletic equipment that an organization provides for its 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.

Summary

Liability shields can be an effective risk management tool. The shields offer a legal and psychological deterrent for the participant to pursue legal actions. Although these transfer techniques may not protect the nonprofit from a lawsuit, they enhance communication and understanding between the parties. Another by-product could be the use of other precautionary measures to safeguard the participants and the organization.

While the information contained in this document may be helpful as you look at the potential use of liability shields such as waivers and informed consent in your organization, do not regard this document as a substitute for the advice of legal counsel. If you are considering the use of contractual risk transfer mechanisms, consult an experienced lawyer for advice on your particular circumstances.