Waivers and Young Participants



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Except in very rare instances*, a contract signed by a minor** is voidable by the minor until he or she reaches the age of majority. A “voidable” contract is legally binding on both parties unless the minor chooses to void the contract, at which time it will no longer be enforced. Often without knowing exactly why, the leaders of most youth-serving organizations recognize the inherent weakness in asking children to sign contracts. Therefore, it has become common practice to either ask parents or guardians to waive their right to sue a public entity for injuries their child sustains, or to ask both the child participant and a parent or guardian to execute a waiver. This article explores some of the issues related to the use of waivers by youth-serving entities, including:

- How state court rulings differ on the enforceability of parental waivers
- Key considerations in careful waiver drafting
- Using a Participant Agreement as an alternative to a waiver

It’s a Different World

Prior to drafting a waiver for a youth-serving program or activity, it is helpful to understand how the state courts differ in their treatment of waivers. There are three general categories into which case law on waivers can be grouped. The first category consists of the 12 states where prior rulings have shown that courts will, in some cases, enforce waivers to protect either schools, other nonprofit or public-serving organizations, or both nonprofit and commercial entities. These states are: Arizona, Alaska, California, Connecticut, Colorado, Florida, Indiana, North Dakota, Ohio, Massachusetts, Minnesota, and Wisconsin.

The second category of states consists of those that take a polar opposite position from the state courts in the first category. In the following 17 states the courts consistently reject waivers signed by a parent on behalf of a minor child: Alabama, Arkansas, Hawaii, Iowa, Illinois, Louisiana, Maine, Michigan, Montana, New Jersey, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and West Virginia.

The third and final category consists of 21 states where there is inadequate information to predict, with any degree of certainty, whether a court will enforce parental waivers. All of the states not listed in the first and second categories fall into the third category. These states are: Delaware, Georgia, Idaho, Kansas, Kentucky, Maryland, Missouri, Mississippi, North Carolina, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Vermont and Wyoming.

*The exceptions to the rule providing that minors lack capacity to enter into a contract are: 1) when a minor enters into a contract to provide support for an illegitimate child; 2) a contract with a bail bonds provider; 3) when the contract has been approved by a court; 4) in some cases where the minor has received benefits per the contract.

**The age of majority–which refers to the age at which someone is no longer considered a minor– is 18 in all but three states: Nebraska, Alabama and Mississippi. In Nebraska and Alabama the age of majority is 19; the age of majority in Mississippi is 21.

10 Tips for Careful Waiver Drafting

If your entity decides to use waivers for certain activities, make certain you take care in drafting. Keep in mind that even in states where waivers are generally enforced, sloppy drafting could render the waiver unenforceable. Follow the steps below to create waivers that have a greater likelihood of holding up.

1. **Use a proper title** — Always use the term “Waiver” or phrase “Waiver and Release of Liability” as the title of your form. Never use a misleading title such as “sign-up sheet.”
2. **Keep it simple** — Limit the purpose and content of the waiver to your request that a parent waive the right to sue for injuries suffered by their child while participating in a program or activity sponsored by your nonprofit. Waiver language buried in a longer document covering a multitude of topics increases the likelihood of disfavor by a reviewing court.
3. **Be truthful and tell it like it is** — Make certain that your waiver contains no fraudulent statements or misrepresentations. For example, don’t indicate that participants may inspect your equipment and facilities if there is no opportunity to do so. Don’t tell parents there is no insurance for the event, if, in fact, there is. Also, clearly describe the specific activity in which the participant will be involved. Refrain from using a single waiver to cover multiple activities of different types, such as ‘field trips’ or ‘outdoors activities.’
4. **Note and describe inherent risks** — Include a separate paragraph in the waiver alerting the participant to the inherent risks of the activity. Draft a representative list of inherent risks associated with the specific program or activity covered by the waiver.
5. **Note the special risks pertinent to the activity, outdoor/indoor location, or type of facility**. Remember that your entity is in the best position to describe the terrain, conditions, physical fitness required, etc., as well as the dangers or unpleasant conditions associated with the activity.
6. **Include an assumption of risk statement that affirms the participant’s voluntary participation**. For example: ‘I acknowledge and accept the inherent and special risks associated with hiking Big Mountain and certify that I am voluntarily participating in the hike on June 10th.’
7. **Use readable type** — While it’s okay to use boldface, underline and italics to highlight key terms, don’t make the mistake of putting important or lengthy sections in ALL CAPS, WHICH ARE HARD TO READ.
8. **Don’t promise a safe environment or safe experience** — Although your organization will do its best to provide a safe and enjoyable experience for participants, it’s never wise to promise safety. A reviewing court may regard a promise of safety as an express or implied warranty, or evidence that any harm suffered by a plaintiff participant must have resulted from gross, rather than ordinary negligence.
9. **Make the waiver section of the document clear** — Ensure that the waiver is clearly drafted and applies to injuries arising from inherent risks or from the nonprofit’s ordinary negligence.
10. **Remember ‘who’ and ‘what’** — Reference which parties seek protection and refer to the negligence of the parties. Some states require that the word “negligence” appear in an enforceable waiver.

Waiver Alternative

If your organization has decided not to require that parents of young clients or participants execute waivers, consider using a Participant Agreement. A Participant Agreement offers several salutary effects. First, in contrast with waivers, which are always perceived as negative, a participant agreement may be perceived as a positive. Second, a participant agreement explains the risks of a particular activity as well as your organization’s important rules related to the activity. Participant agreements give parents the opportunity to make informed decisions about whether to allow a child to participate. Keep in mind that as with a waiver, it doesn’t make sense to only ask the child to sign. A better approach is to request that the minor and the parents sign the agreement.

When using Participant Agreements, always strive to explain the risks and the rules of the activity orally to the

participant and their parents, versus relying on the form to communicate these key messages. Invite participants and their parents to ask questions about any aspect of the activity, and never ask a parent or child to sign an agreement minutes before the activity is set to begin. Here are some important items to include in an Agreement to Participate:

- *Specific description of the activity* — Be specific, and never vague, about the activity in which the child will participate. Note whether the activity is strenuous, intense or unfamiliar. Note the conditions, such as: “the course will be muddy and it may be cold and windy the entire day.”
- *No guarantee of safety* — Remind the participant and parents that your entity cannot ensure the safety of participants. For example: “Activities such as this have inherent risks. Although precautions will be taken, it is not possible to ensure the safety of participants.”
- *Possible injuries* — Include a description of some of the injuries a participant could suffer. For example, “Rock-climbing is inherently dangerous, and participants may suffer cuts, scrapes, bruises and sprains while climbing. Serious injuries are also possible, including broken bones, paralysis or death.”
- *Safety rules* — Include a list of specific rules to which the participant must adhere. Take the time to list as many rules as you can imagine would apply to the activity, but also include language indicating that additional rules may apply. For example: “The following are examples of the rules that apply to all participants.”
- *Other requirements* — List other requirements and expectations of participants, such as your requirement that the participant notify a responsible adult if they become of aware of a hazardous condition, broken or malfunctioning safety device, or violation of safety rules by a leader or other participant.
- *Confirmation of ability to participate* — Ask the participant to affirm that they are capable of participating safely. Also ask the participant to list any physical conditions or illnesses that could affect their ability to participate safely, such as allergies, asthma, etc.
- *Permission to treat* — Ask the parent to specifically consent to the provision of emergency medical treatment and accept financial responsibility for such treatment.

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