

Frequently Asked Questions

Activity Based Waivers

Liability waivers are often used by Subscribers when they engage in any kind of program that requires strenuous physical activity or there is a risk of physical harm. Essentially, liability waivers are written to ensure that the participant is made aware of the risks they may face and that by signing the waiver, they do not hold the organization liable for any injuries which they may sustain. This document provides answers to frequently asked questions related to Activity Based Waivers.

Q What is a waiver?

A A waiver is a legal contract between two parties: the participant and the organizing person or organization offering the program. A waiver outlines both the physical risk associated with those participating in the event and the legal risks. Physical risks are those that are clearly associated with the event e.g. downhill skiing and falling. The legal risk is the risk that the organizers may not act responsibly and behave negligently.

Q Who can sign a waiver?

A Capable adults 18 years of age and over can sign a waiver.

Q What should be included in a waiver?

A A waiver should include the following:

- A description of the event;
- All the parties that you want covered. Err on the side of caution and include all participants as opposed to a selected few;
- Routine risks that the participant may be subject to;
- A hold harmless clause (participant agrees to not hold the organizer responsible for any injuries or losses) and indemnification clause (participant agrees to pay for any losses they suffer as a result of the participation in the activity);
- Expressed acknowledgment that the participant has had an opportunity to ask questions about the waiver and that they sign it freely.

Steer clear of “legalese” and use layman’s terms and common language so that the participant cannot suggest that they did not understand what they were signing.

FAQ

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Q Will having a waiver prevent my organization from being sued successfully?

A The answer is “maybe”. While waivers will not prevent lawsuits, they may offer some protection if a lawsuit is commenced. When properly written and executed, waivers can be useful to restrict or limit liability. Waivers may also act as a deterrent to legal action as the signor may believe that they cannot sue. Keep in mind, the parties signing the waiver must be entered into knowingly and voluntarily. They will not absolve an organization of “negligence”.

In a 2012 BC Court of Appeal ruling, the liability waiver was found to be enforceable by the trial judge and the Court of Appeal because it was clear, drew attention to the impact of the waiver in terms of liability of the service-provider, and gave the plaintiffs the opportunity to read and understand its terms. It is also noteworthy that the Court considered the plaintiffs’ capacity to understand the waiver. Where these conditions are not present, a liability waiver will be less likely to be legally enforceable if challenged.

Q Who should prepare a waiver?

A Often the risk management or legal department has expertise in writing a waiver. Careful attention to the wording is required if the courts are to consider and uphold it in the event of an incident. It is important to remember that waivers, signed or unsigned, are a legal defence to a provable claim. As such, it is up to you, the defendant, to prove they are easily understood, were adequate and are applicable to the claim.

Q What do I do with the signed waivers?

A Ensure the original waivers are kept in a safe place and provide the participant with a copy. Signed releases should be kept for at least two years (which is the limitation period provided by the Limitations Act) plus another six months (as the plaintiffs may take six months to serve the Statement of Claim). Depending on the event, you may wish to centralize the storage of the waivers.

Q How often should I review the waivers?

A Waivers should be reviewed to ensure they meet current legislation or if the event the waiver is supporting changes. Having a standard review schedule (consistent with contract review schedules) would help ensure that the wording is still relevant and will assist in defending a claim.

References and additional resources:

- Using waivers in University Programs and Facilities, Rachel Corbett, Curie Risk Management Newsletter Vol. 5 Iss. 4.
- Liability Waiver Upheld by B.C. Court of Appeal, B. W. Kwasniewski, Carters Charity Law Bulletin, No 284. May 29, 2012.
- Risk Management and Insurance Guide for the Ecotourism and Alpine Skiing Industries, Canadian Tourism Commission.

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