

Manager/Supervisor Risk Management

#111– 12/3/12

A twice weekly e-mail training for YCPARMIA members

TOPIC: LIABILITY WAIVERS

The contract risk transfer discussion, up till now, has involved a contractor assuming liability for potential injuries and damages suffered by a third party claimant. A liability waiver, or exculpatory clause, has the potential claimant assuming the risk of their own injury or damage. The classic public entity example is the waiver that is required before a person participates in a recreational sports league.

The liability waiver is a contract. The participant/claimant gives up the right to pursue a claim in return for the opportunity to participate in the activity. A 1988 California Court of Appeal case laid out waiver issues and acceptable contract language, including:

- They must be easy to read, and cannot be so lengthy and convoluted as to be incomprehensible.
- They need to include magic words like “release,” “discharge,” and “waiver.”
- The language needs to make it clear that the entity is protected from its own negligence.
- The scope and intent of the waiver must be clear in the description of the activity.

The YCPARMIA web site contains examples of a Waiver of Liability, and a Waiver of Liability/Medical Release/and Indemnification Agreement for a Minor that we feel complies with the 1988 case requirements. Obviously it would be appropriate for the entity to run any considered waiver language past their general counsel.

There are three major issues that should be noted:

- An entity cannot have their employees waive workers’ compensation benefits. Most YCPARMIA members have formally adopted the position that their volunteers will be treated like employees for WC, so volunteers cannot waive WC benefits either.
- Minors can void their contracts, so they can void any waiver that they sign. The way around this is to require that their parents sign a waiver that includes an indemnification agreement. The parent agrees to hold the entity harmless if the minor voids the waiver agreement.
- Great care should be taken to retain the waiver for at least a year after the activity ends.

The most common attack on waivers involves the assertion that the injury or damage occurred in a way that was beyond the anticipation of the claimant. An example might be that the claimant accepted the risk of stepping in an outfield hole during a softball game, but the collapse of the bleachers was something that was not included in their intended assumption of risk. The way to counter this type of argument is to carefully describe the involved activity including the scope of risk that is being waived.

YCPARMIA has defended a number of claims by standing on waivers signed by the claimant. While it is not uncommon for them to be resentful, the claimant needs to recognize that without the mitigation of risk provided by the waiver, the entity’s ability to offer the activity might be financially impossible.

Next topic: Fidelity