

WAIVERS – An Informative Guide

DISCLAIMER

The information provided in this guide is intended as general risk management and legal information only. It should not form the basis of legal advice or opinion of any kind. Readers seeking legal advice should consult with a lawyer.

INTRODUCTION

Waivers go by many different names -- *waiver of liability, exculpatory agreement, assumption of risk, release, disclaimer* and *indemnification agreement* are just a few examples of the terms that are used. Generally, waivers are written agreements which people sign before they participate in risky activities. Like insurance, waivers are a risk management technique that involves transferring liability for injuries from one party to another by means of a written contract.

Despite being so widespread in sport and recreation, waivers are terribly misunderstood. Some people think that having participants sign a waiver protects their organization from lawsuits. On the other hand, some people who sign waivers believe they are meaningless pieces of paper. The truth is a bit of both -- in some cases, the courts have upheld waivers. In other cases, and for varying reasons, they have not.

Nonetheless, many sport organizations continue to rely on waivers as a technique for transferring risks, and those who are sports-minded continue to sign them -- even though many of the documents presently in use are poorly designed, badly written and improperly executed. As such, they not only fail to provide legal protection to the organization, but they also fail to inform participants of their own responsibilities and of the risks involved in the sport activity they're undertaking.

The purpose of this information guide is to explain the purpose of waivers and also explains alternatives to waiver agreements such as *assumption of risk, informed consent* and *participant agreements*. These alternatives are educational devices that forewarn participants of the risks they are accepting and the possible consequences. While they don't offer the same legal protection as a waiver of liability, they have considerable legal value and in many circumstances, for ethical or practical reasons, they are preferable to waivers.

WHAT IS A WAIVER?

Basically, a waiver is a legal contract between two parties: the *participant* in a sport or recreation program and the *organization* providing the program. In this contract, the participant agrees not to hold the organization responsible or "liable" for any injuries that the participant might receive as a result of participating in the organization's programs.

A waiver is a very onerous contract because by signing it, the participant agrees not only to expose him or herself to the physical risks of the sport activity, but also to the legal risks. The distinction between these two types of risks is critical to understanding the true legal meaning of a waiver.

There is physical risk associated with all physical activity -- this risk is inherent, unavoidable, reasonable and, in many sport and recreation settings, desirable. Physical risks are the risks, dangers and hazards that are inherent in the activity. An example is downhill skiing -- every skier knows that he or she might be injured by falling at high speed, by colliding with someone or something, or by

improperly getting on or off the ski lift. These physical risks are considered to be inherent in the sport of alpine skiing.

The second type of risk is legal risk. This is the risk that the organizers of a sport activity will behave negligently -- that is, that in managing the program and dealing with participants they will not meet the reasonable standard of care required by law. Using the same example from downhill skiing, there is a risk that a skier will be injured by skiing into a hazard that should have been marked or by falling from a defective ski lift. This legal risk is not inherent in the activity, nor is it desirable, reasonable or acceptable.

Our law says that participants can voluntarily assume the physical and legal risks associated with a sport activity. The mere act of participating in an activity can often be taken as assuming the activity's inherent, physical risks. However, the legal risk (that is, the risk of negligence) can only be assumed by a written agreement or contract such as a waiver.

ETHICAL AND LEGAL ISSUES

When participants sign a waiver, they are expressly consenting to assume the legal risk of the organization's negligence, as well as the inherent physical risks of the sport activity itself. A valid waiver will relieve an organization of responsibility for injuries resulting from the organization's negligence. In other words, if a participant were badly hurt, he or she sued, a court found the organizers to be negligent yet at the same time, the waiver to be valid, *even though they were negligent the organizers would not be held liable* for the participant's injuries.

This kind of protection makes waivers very attractive from the point of view of avoiding liability. However, it also raises a serious ethical issue -- asking people to sign your waiver has the effect of asking them to condone your negligence. Keep in mind that negligence is a precise legal concept that, in general terms, refers to someone's behaviour or conduct falling below an *average, reasonable standard*. In many circumstances, asking participants to accept your negligence (in other words, to say it's okay if your behaviour is below average or unreasonable) is not appropriate.

Ethical issues aside, waivers also raise some tricky legal issues. Because waivers are so poorly understood, they are frequently used in situations that render them unenforceable. For example:

- *minors* (persons under 18 in most provinces) cannot sign legal contracts, nor can their parents or guardians sign a contract on their behalf, particularly a contract as onerous as a waiver of liability. This means that waivers cannot be used in programs for children and youth;
- *mentally incompetent* adults cannot sign contracts -- this means that waivers cannot be signed by mentally disabled individuals (or their parents/guardians) or by adults whose judgment may be clouded by alcohol or some other substance;
- *public policy* might render a waiver unenforceable if participation in the activity is compulsory (for example, a varsity athlete or a physical education student taking courses for credit should not be asked to sign a waiver of liability because their participation in the activity is not voluntary).

A properly worded and executed waiver of liability can offer an organization substantial protection from legal liability, particularly if the sport activity or event is unusually risky. However, a waiver is not always appropriate for ethical or practical reasons, and won't always hold up in court. At

times, a waiver may not even be legally enforceable. For these reasons, the decision to use a waiver should not be taken lightly.

ALTERNATIVE WRITTEN AGREEMENT

Assumption of risk, informed consent and participant agreements are similar to waivers in all but one aspect -- they do not ask the person signing them to forfeit their right to sue in the event of negligence. Instead they ask the participant to consent to the physical risks and hazards that are inherent in the sport, and to accept responsibility for injuries they receive as a result of these risks and hazards.

Agreements such as these are educational tools that forewarn participants of the risks they are accepting and the possible consequences. They have considerable legal value as well, as they show that you have taken reasonable steps to inform participants of the risks involved in the sport activity, and by signing it participants have agreed not to hold you responsible for injuries or losses relating directly to these risks.

Another advantage of these agreements is that they can be signed by minors (those under 18) and by a minor's parents and guardians. In fact, agreement such as these are the only agreements you can use with minors, as our law does not permit minors to enter into contracts, particularly one-sided contracts such as waivers. Minors can only sign contracts that are to their benefit -- a voluntary waiver of their right to sue for negligence is clearly not in any child's best interests. The ability of parents or guardians to sign contracts on behalf of their children is also limited -- in general, the law only allows them to sign contracts that benefit the child.

Your waiver must specifically state the obvious and foreseeable risks, dangers and hazards that you are asking the participant to accept

The majority of waivers in use contain the *phrase "I agree to accept the risks inherent in the activity ..."* or something similar. This is meaningless, unless we can assume that all participants know everything about the activity they're undertaking. Perhaps an expert does, but most participants are not experts, and most need help understanding what the inherent risks, dangers and hazards of an activity are. Remember, too, that a valid contract requires a common understanding between the parties as to the terms of the contract. Waivers are a contract to assume certain risks, so those risks must be identified as clearly as possible.

SUMMARY

There are advantages and disadvantages of using waivers in your sport and recreation programs. Clearly the greatest advantage is that the waiver may hold up and transfer liability in the event of a finding of negligence against your organization. A waiver can also serve as a deterrent to legal action, as the individual signing it might believe that they cannot sue and therefore will not. A waiver is also an excellent educational device that forewarns participants of the risks they are accepting and the possible consequences.