The Use of Waivers of Liability by Health and Fitness Trainers/Facilities to Protect Against COVID-19 Infection Claims and Litigation

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As of the date of writing this article, more than 3 million Americans have become infected with the novel coronavirus ("COVID-19"). Worldwide, that number has exceeded 12 million cases. Deaths from the virus have exceeded 137,000 in the United States (US), while deaths worldwide have climbed to over 550,000. These numbers are increasing.

Those who are most susceptible to contracting COVID-19 and/or dying from it include the elderly and/or obese and those suffering from auto-immune issues or heart disease, those that have preexisting lung conditions and/or other similar issues. While the virus has the capability of rapid community spread and contraction, the virus has a somewhat low mortality rate with more than 7 million people worldwide recovering from the virus to date (almost 1 million in the US).

Health and fitness facilities and trainers were struck with what some have called a major blow from this disease since many US states shut down the operations of such facilities and the activities of trainers working in these facilities due to so-called "shelter-in-place" orders. Since the fitness industry generates over $30 billion a year and serves in excess of 50 million members/users each year through nearly 40,000 facilities, the virus has surely wreaked havoc on the industry and fitness trainers while preventing many customers/clients from using such facilities and partaking in the training services they offer.

Now, after many months of battling the virus, states have slowly began to reopen many businesses, including health and fitness facilities. Health and fitness facilities and personnel have put in place substantial efforts to make their facilities, equipment and services "safely" available to their clients/customers. These efforts have included establishing extraordinary cleaning and sanitation efforts for facilities and equipment, designating specific areas for activities keeping in mind at least six feet of social distancing and requiring the use of masks and sometimes other personal protective equipment by personnel and members/users. Despite such efforts, the risks to personnel and members/users for contracting COVID-19 cannot be entirely eliminated from these establishments and activities. While it may be difficult for facility members/users who contract COVID-19 to establish when and where they may have contracted the virus in the event of illness, the fact remains that business establishments utilized by such persons, including health and fitness facilities and their personnel may become the targets of potential claims and suits as a result of member's/user's contraction of this disease.

Due to the foregoing and in addition to other protective measures, many businesses including health and fitness facilities have begun to develop releases/waivers of liability covering COVID-19 risks to be executed by members/users prior to their use of facilities and equipment or receiving training services. The primary objective of these waivers is to eliminate the risk of liability for a member's contraction of the virus. The use of prospectively executed contract documents like releases/waivers has historically and successfully been used in a variety of businesses, including health and fitness facilities, to bar liability for negligence claims and litigation. The enforceability of such documents is generally dependent upon state, rather than federal law.

The terms "release" or "waiver" refer to contract like documents under which the risks of participation in various activities are specified, coupled with a release/waiver of liability for any untoward event which may occur during the activity. The actual release or waiver document, which terms are generally used interchangeably, are typically signed by the person who will engage in activity and in favor of the person providing the opportunity for the activity. Sometimes similar documents called express assumption of the risk agreements are similarly used in some programs but do not contain a waiver or release of liability provision. Such express assumption of risk documents are sometimes used in those minority of states which do not recognize the use of releases/waivers.

While most states allow the use of these releases/waivers to bar liability for mere negligence, such documents are not generally favored in law and will often be strictly construed by courts. Claims or lawsuits based upon gross negligence or willful/wanted conduct will not be barred through the use of prospectively executed waivers due to various public policy considerations. Some states, such as New York or Virginia, for example, do not allow the use of releases in health and fitness facilities as a result of state statutory or judicially issued law. However, the vast majority of states will allow these contract type documents to be used to protect health and fitness facilities and trainers from liability for acts of general negligence. In fact the use of these documents as a first line defense against negligent liability claims in this setting is almost universal in the US.

Due to the COVID-19 pandemic, releases/waivers for a variety of activities, including those used in health and fitness facilities, have been or will need to be rewritten. Examples of these waivers, which are publicly available, now include releases of liability for a customer's contraction of COVID-19 at a particular facility or due to the activities of, for example, a trainer. It seems relatively certain that negligence claims will be put forth against fitness facilities and personnel based upon alleged failures to wear and/or mandate the use of personnel protective equipment such as masks, failures to provide and/or require the use of gloves and/or hand sanitizers, failures to maintain established social distancing requirements, inadequate indoor fresh air exchanges, etc. Standards and guidelines as to these matters have been established by the Centers for Disease Control and Prevention (CDC) in the US and specifically for health and fitness facilities by the International Health, Racquet & Sportsclub Association (IHRSA). Such standards should be followed by all health and fitness facilities and trainers.

There are a number of newly drafted releases/waivers posted on the World Wide Web (WWW) which now include the risks of contracting COVID-19 while on facility premises or engaged in certain activities.

The facilities which have been included in such posted documents include country clubs, health and fitness facilities, beauty parlors and barber shops, university/college athletic programs and other providers. Some athletic teams at the university/college level have developed such documents, which are sometimes labeled as athletic pledges or agreement-like documents stipulating that athletes will conform their athletic and personal conduct in such a way as to prevent the spread of the virus. Notwithstanding how these documents are labeled, some of them may provide protective relief from claims and suits particularly if they are really assumption of the risk type contracts included within release/waiver agreements. Reportedly, even the National Football League (NFL) is considering the use of documents like these for those spectators who want to attend football games when the teams start to play again.

At present there is no federal law or regulation which provides liability protection to businesses from clients/customers who contract COVID-19. While there have been a number of news stories discussing the enactment of a federal law to deal with these COVID-19 issues, no federal law or regulation has been enacted yet to address this particular subject. To the best of our knowledge, no state litigation has yet been filed and finally decided on this specific liability issue against a health and fitness facility or against a fitness trainer.

Despite the foregoing, while a majority of states have yet to adopt and/or enact legislation regarding liability for COVID-19 contraction, a small number of states, including Louisiana, Kansas and Arizona, have adopted legislation which may provide some liability protection for business establishments seeking to bar or limit their liability from claims of clients/customers who allege that they contracted COVID-19 in such facilities. Iowa has also passed a similar bill which is now awaiting the signature of its Governor. While the legislation developed so far isn't specifically aimed at protecting health/fitness facilities, the legislation may provide premises liability protection for COVID-19 contraction.

For example, Louisiana has adopted H.B. 826 (Act. No. 336) protecting any person, entity or government from liability for any civil damages for injury or death resulting from exposure to COVID-19 in the course of providing business operations. Despite the protective legislation, however, there are a number of exceptions that may open up businesses to potential liability. Louisiana H.B. 826 goes on to further state that a person, entity or government may be held liable if they failed to substantially comply with the applicable COVID-19 procedures established by federal, state, or local governments over their business operations and whether the injury or death was caused by the person, entity, or government's gross negligence or wanton/reckless misconduct. A number of states may follow in Louisiana's footsteps in adopting similar legislation. As a consequence, the importance of following state and federally mandated guidelines may be more important than ever in order to protect these facilities from liability.

While few states have adopted such legislation, to date, there are also a small number of states whose Governors have issued Gubernatorial Executive Orders addressing similar topics. For example. Alabama Governor Kay Ivey issued an executive order stating that no business, health care provider, or other covered entity is liable for injury, death or property damage arising from any act or omission related to

COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the injury was caused by wanton, reckless, willful or intentional misconduct. The language of the executive order was clearly drafted in favor of businesses in that the burden falls on the injured to prove liability. Governor Asa Hutchinson, of Arkansas, has enacted a similar executive order addressing liability for COVID-19 contraction on business premises.

As a growing number of states begin to adopt similar legislation, it remains to be seen the extent and impact of these proposals upon potential business liability. In the meantime, however, in the event of litigation based upon negligence claims, it is very likely that the use of releases/waivers which include the risk of contracting COVID-19, coupled with a waiver of liability provision, will be useful to protect facilities except in those very minority of US states which don't recognize the use of releases/waivers in the health and fitness facility setting. To help strengthen the enforceability of these waivers, it is important that the waivers be narrowly tailored and unambiguous to a fitness/healthy facility's business structure. Consideration should also be given to whether or not such waivers should or could be tailored to protect against the claims of third parties who may contract the virus from a client/customer. Local counsel should be able to assist in the overall drafting process.

Those who ultimately file claims based upon contracting COVID-19 in particular settings may put forth arguments that public policy considerations should bar the use of these release/waiver documents. In these events, public policy arguments may be asserted as a means to advocate that releases/waivers should be ineffective or void. These parties may argue that the risks of contracting a potentially deadly disease such as COVID-19 are not related to the fitness activities to be carried out and should not be a waivable or even an assumed risk given the potential harm. These arguments may also allege that any establishment opening up to carry on activities in light of COVID-19 should not be afforded protections by waiver documents in light of the potential risks associated with the virus since such legal protections may lead to lax virus safeguards. In that event so this argument goes, business establishments should not be protected from inadequate virus protection precautions. Such arguments may be countered by noting that while the risks of contracting COVID-19 are not inherently related to any specific fitness activity or training effort, the risks are related to engaging in activity with other people present, anyone of whom may be infected with the disease. By now, the risks should be well known and appreciated by the U.S. populace. Moreover it should be noted that the risk of contracting the virus at a health or fitness facility are probably small. While the degree of the risk may be somewhat greater than other more sedentary activities, the risk is not great.

Most release/waiver documents provide for a disclosure of those risks which are associated with a client's participation in various fitness/exercise/sport activities. The addition of the risk of possibly contracting the COVID-19 virus while participating in these activities together with a release of liability provision in such forms will go a long way toward an express acknowledgement and waiver of these additional risks. Trainers and health/fitness facilities would be well advised to expand the defined risks set forth within their release/waiver documents and make them part of the waiver language so as to limit their potential liability from COVID-19 claims and litigation. In the jurisdictions which do not recognize waivers in this setting the addition of the risk of contracting COVID-19 can still be added to an

express assumption of the risk document.

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