



ALTUS LEGAL LLC

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## COVID-19 Pandemic and Use of Liability Waivers

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As the State of Illinois progresses with COVID-19 vaccinations, many community associations are considering reopening amenities that remained shuttered throughout 2020, including fitness rooms, pools, outdoor patios, and other recreational facilities. One question we frequently receive from our clients is, “should we require a waiver from all adults using the recreational facilities to limit the association’s liability exposure?”

Liability waivers have, of course, been used by associations prior to COVID-19, often with pools and fitness centers. Such waivers can be revised to put residents and users on notice that he/she assumes the risk of contracting COVID-19 via use of the amenity as well as require the user to attest that he/she will adhere to the association’s rules when using the amenity (face mask usage, social distancing, occupancy limitations, etc.). Finally, the waiver can require that the user “waive” any claim against the association for injuries or illness that may result in the resident’s use of the facility, including contracting COVID-19.

Our guidance throughout the pandemic been this – use of an amenity *may* be conditioned on a user signing a waiver, and, when properly drafted and used in conjunction with other methods to reduce association liability (such as proper signage, adherence to public health office guidance, enforcement of rules, etc.) waivers *may potentially* provide the association more protection from standard negligence claims. **However, the waivers will not protect an association from gross negligence or a general failure to adhere to public health guidance and standards.**

A few items to note about the use of waivers:

1. The waivers must be signed by the users and tracked by the association, which requires careful administrative oversight (occasionally more oversight than the association can provide);
2. The waiver will only be considered potentially valid by a judge if it is clearly and carefully drafted;
3. Compliance with the general public health standards from state and local health officials is paramount for liability protection even without a waiver;
4. Waivers will not protect the association against all lawsuits or liability.

If the association (i) has a good management and tracking system to monitor the execution of the waivers; (ii) uses waivers in conjunction with all other recommended amenity reopening practices recommended by State and local health officials; (iii) the association does not expect the waiver to insulate the association from any and all liability resulting from reopening of amenities; and (iv) the board consults with both the association’s legal counsel and insurance professional, waivers can be useful for association protection.

As stated, a poorly-drafted or unclear waiver may not be worth the paper it's printed on. Thus the importance of consulting with an attorney and the association's insurance agent to discuss what is and is not included in the waiver.

**In our opinion, conditioning use of an amenity on whether or not a waiver has been signed may seem over-bearing, but it is within the board's right to require it.** With associations that do not have a key fob access systems or a key management system (that provides users access to the fitness room or pool), controlling access can be difficult. With key fobs, the board can shut off the users key fob access until the responsible unit owner has executed and returned the waiver to the association (via its board or management office). **Again, without such controlled-access, limiting the use of the amenity to only those who have signed the waiver can prove difficult.**

Ultimately, while waivers can be an effective tool in the association's arsenal or liability protection, it remains our opinion that a waiver is all but useless without careful compliance with all other recommendations and mandates by public health officials, clear signage, and enforcement of rules related to PPE and social distancing.