

Do You Understand your Participant Agreement? Does Anyone?

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IMPORTANT: The following is intended to be general information only – not specific legal advice. Consult with competent counsel familiar with your organization and the laws pertinent to its operations.

Why a Participant Agreement?

It can provide important information to your participants and parents.

It can significantly shape your duty of care to participants, and your exposure to liability, including for negligence.

The Agreement in Perspective:

It is only one part of your risk management plan.

It is not a “cure-all”.

Your focus must always be a quality program.

Negligence Revisited:

Elements of a claim of negligence:

A legal duty – to protect others from unreasonable risks of harm.

A breach of the duty.

A loss, resulting from the breach.

Protection from Claims of Negligence:

Run a good program.

Reduce or eliminate the key element of negligence -- a legal duty.

Duty is the key. No duty? No negligence.

Your Duty of Care:

To protect your participants from unreasonable risks of harm.

A jury will be asked: did you act as a reasonably prudent person would have acted in the same or similar circumstances? (“Reasonable care”.)

Factors Affecting the Duty Owed (defenses):

Inherency of the risk (Primary Assumption of the risk).

Assumption (including Secondary) of Risk.

Release (in advance) of a claim of loss.

(These will be a part of your Agreement)

Elements of a Participant Agreement:

1. Title
2. Intro and Identification of parties
3. Consideration
4. Description of activities and risks

Elements, continued:

5. Acknowledgment and assumption of inherent and other risks
6. Release of claims (of whom, for what?)
7. Indemnity (a promise to protect another from future loss or liability)

More Elements:

10. Other provisions (media, ADR, venue, applicable law, medical consent, partial invalidity, duration, etc).
11. Additional info? Age, contact info, etc.
12. Signature(s)

What is a Release?

An agreement, excusing liability, in advance, for future wrongs.

It can stand alone, or be part of a larger document (a Participant Agreement, for example) which may include a release and other key provisions.

Who Agrees to Release?

1. Participants who might get hurt or suffer other loss.
2. Parent or guardian (other?) for self and for a minor child.
3. Others - staff (for off duty activities), volunteers, contractors?

Who is Being Protected/Released?

All who need protection from claims, including (e.g.):

1. The organization (and any dba, related or parent co., etc.), its owners, staff...
2. Owners of the premises?
3. Contractors? Volunteers?
4. “All persons associated with...” (No!)
5. Other participants? (No!)

Ethical Issues

Why does/should the law allow a party to be excused for hurting another?

Why does/should the law allow a parent to release a child's claim?

Is a Document containing a Release of Negligence Claims Enforceable?

1. Yes, in all but a few states. Rarely, for reckless or intentional wrongs; likely not for strict liability.
2. Not if agreed to by a minor, and, in most states, not by a parent or guardian on behalf of the minor.
3. Use at your peril if not prepared for your program in consultation with competent counsel.

Enforcement issues - Content

1. Elements of a legal contract (mutual assent, no coercion, consideration, competency, legal purpose)
2. Rules of strict construction (exculpatory language)
3. Conforms to general rules re exculpatory agreements: fairly entered into, clear and unambiguous, not against public policy/no public duty.

Enforcement issues - Presentment

1. Misrepresentations/fraud
2. Forgeries
3. Readability
4. Translations
5. E-signing
6. Federal VAR issues/requirements

Common Complaints:

- “The agreement is too long, scary, unfair”.
- “The release encourages carelessness”.
- “May I make changes?”
- “Your staff member said (the agreement) isn’t worth the paper it’s written on”.
- “May my teacher/best friend’s mother sign?”

Some Problem Language:

- “There are inherent risks...which I assume..and for claims relating to which I release (the organization, etc)...”
- “(Organization) has made every effort to assure my safety.”
- “(Organization, etc) shall not be liable...unless the loss is the result of the negligence of such persons”
- “I release claims from activities on or related to the activity (to enrollment).

Words Matter (continued):

- “You may examine the course thoroughly”.
- “Our thoroughly trained staff...”.
- “Every care and attention will be given”.
- “We are not liable for injuries not caused by our carelessness”.
- “We will be constantly monitoring”.
- “The dangers have been minimized”.
- “Staff may make mistakes; you may die”.

Some Take-Aways:

This is not a contest

Strive for clarity – not too short, or long

Check with your lawyer

These things work!

Thank you!

Some Action Items:

- Ask a few typical customers (and parents) to review your agreement for clarity, form, etc.
- Ask your staff to review it, for clarity, accuracy. Instruct them to say nothing which would detract from its intent.

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