COVID-19 Release and Liability Waivers: Real Risk Mitigation or a False Sense of Security?

A risk mitigation strategy that is sometimes employed to help protect a healthcare provider organization with high-risk activities, programs, or areas is the use of release-of-liability forms, liability waivers, or hold-harmless clauses. Given the high number of risks associated with the coronavirus disease (COVID-19) pandemic, service providers are using COVID-19-related liability waivers and attestation statements, asking an individual to attest to the fact that they are not experiencing COVID-19-like signs or symptoms and have not recently tested positive for SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2) before the provider renders services to the individual.

It should be understood that release-of-liability forms and liability waivers do not provide guaranteed or absolute protection. Under most circumstances, all parties involved in business-related relationships, including healthcare and aging services, have rights and responsibilities within those relationships. For instance, even if a person signs a release-of-liability form, liability waiver, or hold-harmless agreement, if a provider organization fails to meet an ordinary common-law duty of care owed by all business operators to provide a safe environment for invitees to do what is in the scope of the invitation, the organization can still be found to be liable for harm to the person. For more information, see ECRI’s Aging Services Risk, Quality, and Safety guidance entitled In the Courts: Court Rejects Hold-Harmless Agreement, available to members.

However, certain elements when consistently included in the liability waiver process can help to create a more favorable environment for defense counsel to argue, in the event of a lawsuit, that the organization met its responsibilities. Mutually establishing and agreeing on rules, rights, and responsibilities for all parties helps establish normative expectations about behavior and helps people make informed decisions because they understand the risks associated with an activity. It also memorializes these conversations so that they can be referred to should the need arise.

Administrative Considerations

Additional practices that ECRI often suggests when organizations use a waiver or liability release include the following:

— Review the waiver and the procedures for its use with your organization’s local legal counsel.
— Include a list of applicable expectations, rules, rights, and responsibilities (including safety rules) that any person participating in the related activity agrees to follow.
— Review the waiver and rules face to face with persons conducting the work or performing the activity. Be sure to explain all elements of the waiver and the consequences for failure to execute these elements.
— Include a statement in the signature section that affirms that all elements of the waiver and the list of rules were explained in person to the signee on the stated date (and by whom) and that the individual understands the contents that were explained. Include a statement that the individual was permitted to ask clarifying questions and that the questions were answered.
— Execute a waiver for each person engaging in the activity and determine the frequency with which the waiver must be reviewed and executed. For example, in the situation of public visitation, specify whether will the waiver be reviewed and executed for each and every visitation episode, or at other intervals.
— Review the rules and guidelines regularly, updating as necessary.
— Maintain copies of all executed waivers.

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Rules, Rights, and Responsibilities

When the decision is made to use a liability waiver or release from liability, ECRI suggests developing a list of rules that pertain specifically to the activity or situation and a list of associated risks that have been identified. It is also advisable to revisit those and other rules on a regular basis during resident council or town hall meetings to reinforce to residents that they also have an obligation to help manage the behaviors of their visitors—enforcing the rules is not solely the responsibility of the provider organization.

Examples of COVID-19-related or other outbreak-related rules, rights, and responsibilities for public visitation might include the following:

- Requirements for use of cloth face coverings
- Visitor sign-in guidelines
- Screening participation for COVID-19 signs and symptoms
- Adherence to handwashing guidelines
- Reporting of COVID-19-like signs and symptoms
- Areas where visitors are permitted and where they are prohibited during outbreak response periods

Attestation Statements

As with liability waivers, it is best for providers to work under the assumption that attestation statements do not provide absolute protection to the provider if an individual is found to have an infectious disease after they have signed a statement attesting that they have no signs or symptoms. COVID-19 provides an example of why an attestation statement might not provide protection, given that many people who were asymptomatic have tested positive for SARS-CoV-2. A person may attest in good faith that they do not have signs or symptoms of COVID-19 because they are unaware they are infected.

However, although the attestation statement does not provide absolute protection to the organization, the conversation around the signing of the attestation does provide the opportunity to emphasize to visitors to aging services facilities that they may pose a health threat to the person they are visiting, or to other residents of the facility, if they are positive and contagious (knowingly or otherwise) at the time of their visit. Such conversations may help visitors understand why certain control measures, such as limits on visitation, are important in protecting the health and welfare of residents and staff alike.

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