Employer Update

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# Liability Waivers and Workers' Compensation During Business Reopening

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As businesses begin to reopen, employers are considering how to address the potential risk of liability to employees arising from Covid-19 infections contracted in the workplace. These concerns have prompted renewed focus on two well-established workplace principles:

- Liability waiver agreements purporting to exonerate employers prospectively from employees' workplace injury claims are void and unenforceable
- Workers' compensation is generally the exclusive remedy through which employees can recover from employers for workplace injuries

But beyond the guidance from these rules, there are areas of potential liability for businesses that fall outside the bounds of workers' compensation laws, and for which liability waivers may be helpful to mitigate risk.

This article discusses the general rules governing liability waivers and workers' compensation—with a focus on New York, though many states have similar laws in these areas—including the rules related to non-employees, such as contractors, vendors, or customers, and examines the extent to which liability waivers may be desirable or enforceable in those circumstances.

## Liability Waivers Under New York Law

Prospective liability waivers may be enforceable in New York, but only under limited circumstances. As a threshold matter, New York—like many states—allows for prospective waivers of liability only for negligent acts. Courts will not enforce liability waivers to the extent they purport to exculpate acts of higher culpability, including willfulness or gross negligence. For example, in *Gross v. Sweet*, 400 N.E.2d 306 (N.Y. 1979), the court of appeals refused to enforce a liability waiver to the extent it purported to waive grossly negligent conduct for personal injuries suffered during a parachuting lesson.

Even where the plain language of a liability waiver is limited to negligent acts, enforceability depends on the nature of the relationship between the parties. In New York, liability waivers will not be enforced "where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual." In *Ash v. New York University Dental Center*, 564 N.Y.S.2d 308, 311-12 (N.Y. App. Div. 1990), the court explained that a special relationship exists where, for example, the parties to an agreement have unequal bargaining power "creating a substantial opportunity for abuse," whereby "one party 'must accept

what is being offered or be deprived of'" the proposed relationship's benefits.

The court in *Ash* refused to enforce a liability waiver between a public dental clinic and its patients, reasoning that it "is the very importance of such clinics to the people who use them that would create an invidious result if the exculpatory clause in issue were upheld—i.e., a de facto system in which the medical services received by the less affluent are permitted to be governed by lesser minimal standards of care and skill than that received by other segments of society."

## The 'Exclusive Remedy' of Workers' Compensation

New York courts have long held that the employer-employee relationship is a "special relationship" in which an overriding public interest demands that liability waivers be unenforceable. The courts in *Johnston v. Fargo*, 77 N.E. 388, 390 (N.Y.. 1906), a seminal case on the issue, and *Richardson v. Island Harvest, Ltd.*, 166 A.D.3d 827, 828-29 (N.Y. App. Div. 2018), reasoned that employers and employees are in unequal bargaining positions because employees need employment and may not understand liability waivers, and further, that the public has an interest in preventing employers from contracting away their duties to ensure safe work environments.

While state law precludes employers from requiring employees to sign liability waivers, state law also protects employers by providing a cap on employers' liability to employees for most workplace injuries. Section 10 of New York's Workers' Compensation Law provides that an employer will "secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury," except for injuries resulting from the employee's intentional acts or intoxication from alcohol or a controlled substance. Section 15 of the WCL establishes a detailed schedule capping the compensation available for various injuries. Importantly, under Section 11:

> [t]he liability of an employer prescribed by [the WCL] shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom.

This provision, known as the "exclusive remedy" rule, protects employers from liability to employees for workplace injuries beyond the caps set forth in the WCL. The only exceptions to the exclusive remedy rule under the WCL are where an employer has not obtained workers' compensation insurance or where a workplace injury results from an intentional tort committed by the employer or at the employer's direction, in which case the injured employee may pursue damages from the employer at common law or otherwise.

## Liability in the Context of Non-Employees

As businesses frequently have non-employees in their workplaces, employers concerned about potential Covid-19-related liability must consider anyone who may enter the re-opened workplace, whether or not they are an employee of the business. Such concerns may raise several questions in the mind of employers, such as: Do workers' compensation laws provide any protection to employers for injuries suffered in their workplace by other entities' employees? And, if not, would courts enforce liability waivers between a business and other entities' employees?

As for the first question, the coverage and liability caps under the WCL extend to individuals who have a "special employment relationship" with the business—a concept similar to what in some other contexts is called a "joint employment" relationship. The key factor in identifying such a relationship is whether the employer controls and directs the manner and details of the employees' work. *See*, e.g., *Fung v. Japan Airlines Co.*, 880 N.E.2d 845, 849-52 (N.Y. 2007); *Alvarez v. Cunningham Associates, L.P.*, 800 N.Y.S.2d 730, 731–32 (N.Y. App. Div. 2005). For instance, in *Cameli v. Pace University*, 516 N.Y.S.2d 228, 228-230 (N.Y. App. Div. 1987), an employee of a cleaning company was deemed a "special employee" of the university

where he was assigned by the cleaning company to work, because the university could fire the employee and trained and supervised him.

The applicability of the WCL is otherwise limited to an employer's own employees and does not extend to others in the workplace, including independent contractors. For example, in *Clemens v. Brown*, 894 N.Y.S.2d 197 (N.Y. App. Div. 2010), where the parties presented contradictory evidence regarding the plaintiff's employment status at the time of his injury, the court explained:

> If, at that time, plaintiff was, as defendant claims, his employee, the exclusivity provisions of the Workers' Compensation Law apply and plaintiffs' claims against defendant must be dismissed. On the other hand, if plaintiff was, as he claims, an independent contractor, then the Workers' Compensation Law has no application to this action.

The WCL does offer a measure of protection to employers from certain claims asserted by third parties—namely, claims for common law contribution or indemnity. Section 11 of the WCL provides that an employer "shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person … has sustained a 'grave injury'" (such as death, amputation, blindness, deafness, etc.).

Thus, for example, if a telephone system technician contracts Covid-19 while installing a phone system at a client's workplace and sues the client for damages, the WCL would preclude the client from seeking contribution or indemnity from the technician's employer. However, there's a catch: The prohibition on contribution or indemnity claims under Section 11 of the WCL does not apply to contribution or indemnity claims based on a preexisting written contract. That means that if the client and the technician's employer had agreed in advance to a written indemnification agreement, the client would be free to seek indemnity from the employer under that contract for liability resulting from the technician having contracted Covid-19 in the client's workplace.

While employers will not find protection in the WCL for liability from workplace injuries suffered by non-employees, employers may find such protection by way of prospective liability waivers, which may be enforceable with non-employees even though they would not be enforceable with employees. As a general matter, liability waivers are often enforceable in commercial settings, including in the context of contractors and customers.

For example, in *Florence v. Merchants Cent. Alarm Co.*, 412 N.E.2d 1317 (N.Y. 1980), the court concluded that a liability waiver between an alarm company and a subscriber was enforceable and emphasized that the waiver was entered into in a "commercial setting." Similarly, in *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413 (N.Y. 1983), the court concluded that a liability waiver entered into by a contractor installing heating, ventilating and air conditioning in police headquarters was enforceable and emphasized entered into "at arm's length by sophisticated contracting parties."

However, there are certain circumstances beyond the employment relationship, even in the commercial context, where New York law prohibits liability waivers. New York's General Obligations Law §§ 5-321 to 326 precludes liability waivers in the context of specific industries, including "between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities" where the "owner or operator receives a fee or other compensation for the use of such facilities"; in property leases, the catering industry and the construction industry; and by architects or engineers, building contractors and garages or parking lots.

New York case law also prohibits liability waivers in certain contexts other than employment relationships, including between passengers and common carriers, and landlords and tenants. *See Theroux v. Kedenburg Racing Ass'n*, 269 N.Y.S.2d 789, 793 (N.Y. Sup. Ct. 1965), aff'd sub nom. *Theroux v. Kedenburg Racing Ass'n*, 282 N.Y.S.2d 930 (N.Y. App. Div. 1967).

Although it is unclear how courts will view liability waivers for potential Covid-19-related claims in light of the pandemic, such agreements entered into with non-employees may be sufficiently distinguishable from agreements with employees that a compelling argument could be asserted for the former to be enforceable. For example, unlike in the employer-employee context, businesses generally do not have unique control over the employment of non-employees in the workplace, and typically do not control or direct the employees' work. Moreover, the WCL reflects a public policy decision to differentiate—for purposes of workplace injuries—between employees, over whose activities a business exercises control, and other people in the workplace. *See Johnston v. Fargo*, 184 N.Y. 379, 383 (N.Y. 1906).

Of course, arguments exist that some relationships between an employer and non-employees in its workplace, such as independent contractors or workers with whom it may arguably have a "joint employment"-type relationship, meet the requirements of a "special relationship" in which an "overriding public interest" precludes the enforceability of liability waivers, particularly in view of public interests related to Covid-19. Courts would likely need to assess such circumstances on a fact-specific basis to determine whether a liability waiver should be enforced, based on the nature of the relationship between the parties.

## Considerations in Seeking Waivers

While liability waivers between businesses and non-employees may serve to reduce legal risk, businesses also must bear in mind various practical considerations when deciding whether to ask for liability waivers. For example, some might worry that a business requesting a waiver is not taking adequate workplace safety precautions in light of Covid-19. Others might view an attempt to avoid liability for exposing people to a pandemic as distasteful.

Of course, some individuals might not have an adverse reaction to being asked to sign a liability waiver—for example, because they understand its business purpose (particularly in the current environment), or because they have grown weary of staying at home and will happily sign waivers to engage in activities outside the home. Regardless, employers should consider the possibility of adverse reactions from individuals asked to sign a liability waiver—and the business or reputational implications that might have—when assessing whether to ask any categories of non-employees to sign liability waivers as a condition of entering the employer's workplace.

These assessments may differ based on such factors as the nature of the business, how frequently customers or other non-employees typically enter the employer's premises, how much time they typically spend there, and how closely they interact with others on the premises. These factors, among others, could affect the magnitude of risk that any such person will be exposed to Covid-19 on the employer's premises, as well as the practical reality of whether requiring such persons to sign liability waivers is feasible and desirable.

For example, a business with a time-sensitive computer problem may care more about getting the problem fixed quickly than conditioning their IT consultant's entering the premises on obtaining a liability waiver, whereas if the computer problem were not time-sensitive then the business might be more inclined to ask for the waiver and risk a delay in having an IT consultant enter the worksite.

Contribution or indemnification agreements, between a business and the employers of any workers who enter the worksite of the business, also could play a useful role in reducing liability risk related to Covid-19. Such agreements could be either in lieu of, or in addition to, liability waivers with the individuals entering the workplace.

Given the risk that some courts might hesitate to enforce a liability waiver between an individual and a business based on any concerns about their relative bargaining power under the relevant circumstances, a contribution or indemnification agreements between businesses—which would more likely be viewed as an arms-length transactions between parties of equal bargaining power—would provide an extra measure of protection for the business allowing non-employees to enter its workplace.

When businesses do choose to seek liability waivers, they should keep in mind that for a waiver to be enforceable, it must be a "voluntary and intentional relinquishment of a known … right." *Jay Arthur Goldberg, P.C. v. 30 Carmine LLC*, 896 N.Y.S.2d 660, 661–62 (N.Y. Sup. Ct. 2010). To meet this standard, a waiver must be explicit, i.e., "clear, unmistakable, and without ambiguity." *Civil Serv. Employees Association, Inc. v. Newman*, 88 A.D.2d 685, 686 (N.Y. App. Div. 1982). Thus, businesses should not assume that broad language exculpating the business from liability for damages will guard against negligence claims. Rather, businesses should:

- Use language that the other party will understand
- Use the term "negligence" to ensure the other party (and courts) will know that claims for personal injuries resulting from the employer's negligence are waived
- State expressly that the waiver does not include claims for gross negligence or willfulness
- Specify that the waiver includes Covid-19-related claims
- Provide enough context that the other party understands the COVID-19-related risks, as well as any other risks specific to the worksite or activity at issue

Finally, while courts do not require that a party by given any minimum amount of time to review a waiver before signing (for example, the court in *Jackson v. Blank Ink Tattoo Studio, Inc.*, No. 153054/15 (Sup. Ct. N.Y. 2016), enforced a liability waiver that the plaintiff received just minutes before a tattoo artist began a tattoo), businesses should provide reasonable advance notice to non-employees of any requirement that they sign a liability waiver before entering the workplace, and allow sufficient time for such individuals to review and consider the waiver agreement. These measures will enhance the likelihood of the liability waiver being enforced, and thus, serving its purpose.

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# Marijuana and the Workplace

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Many employers choose to maintain a drug-free workplace in the interests of promoting employee safety, health and productivity. However, notwithstanding the fact that marijuana is prohibited under federal law, thirty-three states and Washington D.C. now permit some form of marijuana use, and thus employers must consider whether a drug-free workplace policy contravenes any of these laws. In this article, we offer some perspective on issues for employers to consider, including: background on what marijuana is, a summary of the legal landscape regarding whether and when an employer may engage in testing for marijuana use, and some suggestions concerning policies that employers may adopt to promote a drug-free workplace while respecting employees' new rights under medical or recreational marijuana laws.

## Cannabis, Marijuana or Hemp?

In considering how to address the effect of marijuana in the workplace, employers must be able to distinguish among the various cannabis-related products, including marijuana, that exist in the marketplace. Marijuana is a term for a drug, derived from parts of the flowering plant called "cannabis," that contains more than 0.3% of the compound delta-9-tetrahydrocannabinol ("THC") on a dry weight basis. This drug is at times referred to as "cannabis." The THC in marijuana may cause affected individuals to experience relaxation, euphoria, anxiety, distrust, and/or an altered sense of time. Marijuana may also impair concentration, reduce coordination and cause short-term memory loss. By contrast, hemp is a term for cannabis that contains 0.3% or less THC on a dry weight basis. CBD, which stands for cannabidiol, is another compound found in the cannabis plant, which means CBD can be derived from both marijuana and hemp. Unlike THC, CBD does not produce psychoactive effects.[1]

The Controlled Substances Act, Title II of the Comprehensive Drug Abuse Prevention and Control

Act of 1970 ("CSA"), states in part that individuals may not "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense. . . [or] create, distribute, or dispense, or possess with intent to distribute or dispense" marijuana. *See* 21 U.S.C. § 812, 841 *et seq*. Marijuana-derived CBD is governed by the CSA and other marijuana laws. Section 12619 of the Agriculture Improvement Act of 2018 removes hemp-derived products, including hemp-derived CBD, from coverage under the Controlled Substances Act, provides that the U.S. Department of Agriculture will now regulate hemp, and removes hemp as a controlled substance under the jurisdiction of the U.S. Department of Justice.

The efficacy of marijuana and THC for medicinal purposes and the short- and long-term effects of marijuana consumption remain a controversial issue, although elements in marijuana have been used in Food and Drug Administration approved medications.[2] Questions also remain regarding how the amount of THC in the blood relates to an individual's incapacity or impairment. The amount of THC in the blood may or may not be an indicator of incapacity in the same way as the blood-alcohol levels with which people are familiar.[3] This fact can create a complicating issue for employers who test for marijuana consumption, because THC can be observed in the body days after consumption.[4]

## Federal Drug Testing Law

The Americans with Disabilities Act ("ADA") generally permits, but does not require, employers to test employees to determine whether they use illegal drugs, *see* 42 U.S.C. § 12114(d)(1), including marijuana, *see* 42 U.S.C. § 12111(6). However, employers in certain industries, for instance those employing commercial drivers or aviation personnel, must test employees for possible use of specified substances including marijuana. *See* 49 C.F.R. 382.301-311; 14 C.F.R. 120.3, *et seq.* The Drug-free Workplace Act ("DFWA") mandates that federal contractors establish a drug-free workplace and so prohibit marijuana intoxication at work. *See* 41 U.S.C. § 8102.

## State Laws on Marijuana

Several courts have concluded that an employer may take action against an employee who uses marijuana in a manner that does not contravene applicable state laws. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. 2010), the Oregon Supreme Court held that an employer acted lawfully when it refused to hire a temporary employee on a permanent basis after the employee explained that he would fail a drug test because he used medical marijuana outside work. *See id*. at 520-21, 524-36. The court reasoned that Oregon's disability-discrimination law does not apply to applicants or employees currently engaged in the illegal use of drugs if the employer takes action based on that conduct and marijuana use is an illegal use of drugs because marijuana is illegal under the CSA. *Accord Coats v. Dish Network, LLC*, 350 P.3d 849, 850-51 (Colo. 2015).

In some states, state disability-discrimination law requires employers not to take action against employees or applicants for medical marijuana use or intoxication where the marijuana treats a disability or its symptoms. In New York, certified medical marijuana users are deemed to have a disability. *See* N.Y. Pub. Health Law § 3369(2). In order to receive a "patient certification" under this law, an individual must, among other elements, have "a serious condition, which shall be specified in the patient's health care record" and in a practitioner's professional opinion and review of past treatments, "the patient is likely to receive therapeutic or palliative benefit from the primary or adjunctive treatment with medical use of marihuana for the serious condition." *Id.* at § 3361(1). In *Wild v. Carriage Funeral Holdings, Inc.*, 2020 WL 1144882 (N.J. Mar. 10, 2020), the Supreme Court of New Jersey concluded that an employee had a cause of action for disability discrimination where an employer discharged him for testing positive for marijuana because he used medical marijuana for his cancer outside work. *See id*. at *3; *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144, 1148 (N.J. App. Div. 2019). *Accord Barbuto v. Advantage Sales & Marketing, LLC*, 477 Mass. 456, 462-66 (2017).

One unresolved question is whether permitting the use of or intoxication from medical marijuana in the workplace is an unreasonable accommodation, because it would pose unacceptable safety risks to the employee, other employees, customers and/or the public; would impair the employee's ability to perform his or her job, or would preclude the employer from meeting statutory or other obligations. In New York and New Jersey, statutes permit employers to prohibit, respectively, medical marijuana impairment and medical marijuana use at work. *See* N.Y. Pub. Health Law § 3369(2); *Wild*, 2020 WL 1144882, at *3. In *Barbuto*, the court explicitly did not decide whether an employer had to permit on-site medical marijuana use if it would create unacceptable safety risks or "would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform business." *Id.* at 467.

Several states prohibit employers from taking action against an employee based on that employee's status as a medical marijuana user. *See*, *e.g.*, Ariz. Rev. Stat. § 36-2813(B)(2). These states generally permit employers to forbid marijuana intoxication at work, *see*, *e.g.*, Ariz. Rev. Stat. § 36-2813(B)(2), and several states have exceptions for actions taken against employees engaged in safety-sensitive positions, involving such tasks as operating motor vehicles, working public utilities, handling machinery, dispensing pharmaceuticals, and caring for patients or children, *see*, *e.g.*, Okla. Stat. Ann. tit. 63, § 427.8(2)(c).

Arkansas and Illinois explicitly permit employers to maintain drug-testing policies and to take actions against medical marijuana users pursuant to those policies. *See* Ark. Const. amend. XCVIII, § 3(B)(i); 410 Ill. Comp. Stat. 130/50(b).

In Arizona and Oklahoma, employers may not take action against medical marijuana users for testing positive for marijuana unless a user possessed, consumed or was under the influence of marijuana at work. *See* A.R.S. § 36-2813(b)(2); Okla. Stat. Ann. tit. 63, § 427.8(H)(2)(b).

There are still many questions which have not been answered by judicial decisions. One question is whether the CSA and the DFWA preempt such laws. Some courts have concluded that the CSA does not preempt them because the CSA does not prohibit employing illegal drug users or otherwise regulate employment. *See Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 335-36 (D. Conn. 2017); *Chance v. Kraft Heinz Foods Co.*, 2018 WL 6655670, at *3-4 (Del. Super. Ct. Dec. 17, 2018). In *Noffsinger*, 338 F.Supp.3d 78 (D. Conn. 2018) ("*Noffsinger II*"), the court held that the DFWA does not preempt state law because the DFWA does not require drug testing or prohibit employing people who use illegal drugs outside work. *See id.* at 84.

Another question is what discrimination based on a person's status as a medical marijuana user means. In *Noffsinger II*, the court rejected the employer's argument that Connecticut prohibits discrimination based on *status* as a medical marijuana user and not based on a positive test for marijuana, because such an interpretation would nullify the statute's protections. *See id.* at 84-85.

## Employer Takeaways

Employers should consult counsel about drug-free workplace and drug testing policies. Although all employers are permitted to establish and maintain drug-free workplace policies which prohibit being under the influence of illegal drugs, including marijuana, in the workplace, state law differs widely in important areas related to marijuana in the workplace.

Employers in the majority of states, including Oregon, Colorado and California, can require drug tests and take action against employees who test positive for marijuana. In some states, however, there is legal risk for employers that refuse to hire, discipline or discharge medical marijuana users for testing positive for marijuana. Employers might argue that the CSA or the DFWA preempts state law, but to date such arguments have not been effective in courts addressing this issue. If an employee or an applicant tests positive for marijuana, employers should consider requesting documentation of medical marijuana use. If documentation shows the individual is a medical marijuana user, the employer should consider not taking action based on the test alone. Supervisors should look for signs of marijuana

intoxication, including red eyes, decreased muscle coordination, delayed reaction times and increased appetite or anxiety. Supervisors should document such symptoms and employers should cite them as evidence of marijuana impairment at work if the employer takes disciplinary action against a medical marijuana user.

Additionally, in some states, if an employee requests permission to use medical marijuana as an accommodation, because the marijuana treats a disability or its symptoms, there is legal risk if the employer does not handle the request as any other request for a disability accommodation. An employer might argue that permitting marijuana intoxication in the workplace is an unreasonable accommodation but whether such an argument succeeds depends on such factors as whether the employee's marijuana use creates a threat to the employee or others, impairs the employee's ability to perform his or her job, or prevents the employer from satisfying statutory or contractual obligations.

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[1] *See* Dominique Astorino, What's the Difference Between CBD, THC, Cannabis, Marijuana, and Hemp?, Shape, https://www.shape.com/lifestyle/mind-and-body/difference-between-cbd-thc-marijuana-hemp-cannabis (last accessed Mar. 10, 2020); Rudy Sanchez, Marijuana vs. Hemp: What's the Difference?, Chicago Tribune, https://www.chicagotribune.com/marijuana/sns-tft-whats-the-difference-marijuana-hemp-20190815-nljrmyx7hvdedhca4vhwqj4a3e-story.html (last accessed Mar. 10, 2020).

[2] *See* Marijuana, National Institute on Drug Abuse, https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-safe-effective-medicine (last accessed Mar. 11, 2020).

[3] *See*, *e.g.*, Richard Compton, National Highway Traffic Safety Administration, Marijuana Impaired Driving: A Report to Congress at 6, 7 (July 2017); Kristin Wong, Joanne E. Brady, Guohua Li, Establishing Legal Limits for Driving Under the Influence of Marijuana, Injury Epidemiology at 7-8 (2014) ("Establishing Legal Limits").

[4] *See* Establishing Legal Limits at 5-6.

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