



# Minimizing COVID Risks to Your Business: Release and Indemnity Agreements

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## A. Introduction

For the past nine months, businesses and non-profit entities have been attempting to minimize the risks of doing business in the midst of the COVID pandemic. The steps to minimize such risks will be required for the months to come and include establishing and instituting safety protocols such as temperature monitoring, mask use requirements, hand sanitizing, and social distancing. Some businesses have taken the additional step of requiring customers or clients to sign a written agreement with a goal of insulating the business from liability for COVID-related claims. These agreements (hereinafter referred to as COVID Agreements) include release and/or indemnity language. The purpose of this article is to discuss the law pertaining to release and indemnity agreements in general and language that should be included in COVID Agreements to provide that broadest possible protection.

## B. Indiana Law on Exculpatory Releases and Indemnity Agreements

In Indiana, parties are generally permitted to agree in advance that one is under no obligation of care for the benefit of the other and shall not be liable for the consequences of conduct that would otherwise be negligent.<sup>1</sup> This kind of agreement is sometimes referred to as a waiver or exculpatory release. A release is a surrender of a claimant's right to prosecute a cause of action.<sup>2</sup>

A release is a contract, and like any contract, it must be supported by sufficient consideration.<sup>3</sup> The concept of consideration is encapsulated in the phrase "bargained for exchange."<sup>4</sup> Where consideration of an indeterminate value is agreed upon by the parties, a court will not undertake to determine its adequacy but will respect the judgment of the parties and enforce the contract.<sup>5</sup>

Interpretation of a release, like any other contract, is determined by the language of the particular instrument, considered in light of all the facts and circumstances.<sup>6</sup> An agreement in advance that a business will not be liable for the consequences of its conduct is **not** generally against Indiana public policy.<sup>7</sup> However, the party seeking to enforce such a contract has the burden of showing that the provisions were knowingly and willingly accepted. *Id.* There are exceptions to the general rule that such agreements are not against public policy when transactions affecting the public interest such as public utilities, common carriers, and innkeepers are involved.

An indemnity agreement is similar to an exculpatory release but involves a promise by one party (indemnitor) to reimburse another party (the indemnitee) for the indemnitee's loss, damage, or liability.<sup>8</sup> Indemnity provisions sometimes include the terms "save harmless" and "hold harmless." An indemnity agreement will cover all losses and damages to which it reasonably appears the parties intended it to apply.<sup>9</sup> However, agreements to indemnify another for the other's own negligence are disfavored by the courts because an undertaking by one party to pay for the negligence of another is an extraordinarily harsh burden that no party would lightly accept. These agreements must be clear and unequivocal and are strictly construed.<sup>10</sup> Accordingly, the indemnifying agreement must expressly state in clear and unequivocal terms that negligence is an area of application and that it applies to the indemnification of the indemnitee by the indemnitor for the indemnitee's own negligence.<sup>11</sup>

## C. Drafting Effective COVID Agreements

Based on the guidance from Indiana case law discussed above, the broadest and most effective COVID Agreement will contain the following:

- Language Regarding Consideration

To make it clear that there is an agreed consideration for the release and indemnity provisions, the written agreement should expressly state that the consideration for the release is whatever service is being provided, and that such consideration is sufficient or adequate for the release and indemnity agreement.

- Language Specifically Releasing and Indemnifying for Claims for the Negligence of the Business

The Agreement should include language making it clear and unmistakable that the customer is releasing the business for COVID exposure or illness arising out of negligence in general and the negligence of the business in particular.

- Language Regarding Indemnity for Claims Made by Others

One of the virus's risks is that a customer may acquire the virus from your place of business and carry it home to family members or to other third parties. Accordingly, a COVID Agreement providing the greatest protection will include language that requires the customer to indemnify the business for claims that may be made by third parties arising from any exposure to the virus at the business.

- Language Explaining the Uncertainties and Risks Regarding COVID

Businesses can take measures to help protect customers from exposure to the virus and customers, but clients or guests may still be exposed and contract the virus from those related to the business, including employees or other customers. A written explanation of the risks and uncertainties of COVID and COVID exposure related to the business will assist in showing the release and indemnity agreement was knowingly and willingly accepted.

- Language that the Release is Knowingly and Willingly Entered

To assist in establishing a knowing and willing acceptance of the release, the release and/or indemnity language should be in larger and bolder type than the other language on the written form. Additionally, language such as THIS IS A RELEASE with a statement that the release and indemnity agreement is being knowingly and willingly signed should be placed immediately above the signature.

## D. Conclusion

COVID has created numerous additional risks and hardships for many small businesses. Steps can be taken by businesses to reduce the risks presented by COVID, including the use of carefully drafted COVID Agreements.

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<sup>1</sup> Prosser, *Law of Torts*, § 68, at 442 (4th Ed. 1971)

<sup>2</sup> *Gearhart v. Baker*, 393 N.E.2d 258, 260 (Ind. Ct. App. 1979)

<sup>3</sup> *Lechner v. Ruetepohler*, 545 N.E.2d 1144, 1147 (Ind. Ct. App. 1989)

<sup>4</sup> *DiMizio v. Romo*, 756 N.E.2d 1018, 1022 (Ind. Ct. App. 2001); *Hunt v. Dederich*, 105 Ind. 555, 5 N.E. 710 (1886)

<sup>5</sup> *Kincaid v. Lazar*, 405 N.E.2d 615, 620 (Ind. Ct. App. 1980)

<sup>6</sup> *Babson Bros. Co. v. Tipstar Corp.*, 446 N.E.2d 11, 16 (Ind. Ct. App. 1983)

<sup>7</sup> *La Frenz v. Lake Cnty. Fair Bd.*, 360 N.E.2d 605, 607 (Ind. Ct. App. 1977)

<sup>8</sup> *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 756 (Ind. Ct. App. 2002)

<sup>9</sup> *Essex Group, Inc. v. Nill*, 594 N.E.2d 503, 506 (Ind. Ct. App. 1992)

<sup>10</sup> *Henthorne*, *supra* note 8, at 757; *United Consulting Eng'rs v. Bd. of Comm'rs. of Hancock Cnty.*, 810 N.E.2d 351, 354 (Ind. Ct. App. 2004)

<sup>11</sup> *BC Osaka, Inc. v. Kainan Inv. Grps., Inc.*, 60 N.E.3d 231, 234–35 (Ind. Ct. App. 2016)



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## ABOUT THE AUTHOR

Laura Reed counsels insurance companies, businesses, non-profit organizations, and individuals regarding insurance coverage issues and represents them in litigation arising from insurance coverage disputes and bad faith.

Laura also represents clients in business and civil litigation involving premises liability, product liability, construction, and transportation issues.

Laura served on the Firm's Management Committee from 2013 to 2016.

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