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NORTHEASTERN UNIVERSITY SCHOOL OF LAW
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Considerations on Risks of Customer Liability for COVID-19

As businesses re-open their doors, owners are asking about the liability risks from customers who claim to have contracted COVID-19 due to an exposure at their business. This document shares some information evaluating the risk of suits by customers who have contracted COVID-19 and some recommendations for steps that businesses can take to manage that risk[1]

I. Risk of Customer Suits for Contracting COVID-19

A business owner always faces the risk that a customer sues them for something that happens while the customer is at their business, like a slip and fall. So, it is certainly possible that a customer could sue a business owner if they believe they contracted COVID-19 from their establishment.

Business owners should remember that they always have legal obligations to take reasonable steps to protect their customers' safety. In the terminology of the laws of tort and negligence, business owners owe their customers a "duty of care" to minimize foreseeable harm by taking reasonable precautions. To succeed in a tort liability claim, a customer will need to prove that the business owner violated its "duty of care" to the customer and that the business owner's failure to meet their duty of care was what caused the customer's injury.

Whether and how those elements can be proven in a COVID-19 customer liability case will ultimately be tested and established by the courts in the coming months and years. While we cannot predict how courts will ultimately answer these questions, there are steps that businesses can take to minimize the risks they face, which we outline below.

Unfortunately, preventing a lawsuit in the first place is at best difficult, and arguably impossible. There is no merit-based test to file a suit, and a person can be made to respond to a suit whether or not the suit is ultimately valid. But taking steps now to manage this risk will make things easier if you do get sued.

II. Possibility of Legislation

Congress or the Massachusetts legislature could step in and protect businesses from COVID-19 liability suits. This is something that Congress is actively considering. Businesses should continue to monitor this. You can contact your legislators for information regarding the latest on legislation to protect businesses from COVID-19 lawsuits. You can find the contact information for your representative at the Federal level by using this link: <https://www.house.gov/representatives/find-your-representative>. But remember that even if legislation does move forward, it is unlikely to absolve businesses of their responsibility to continue to follow government safety protocols.

[1] This information will vary by state. The information in this document is specific to Massachusetts. This information is not specific legal advice, but a general overview as of July 19, 2020. You should not rely on this material without first seeking legal advice. The information is specific to lawsuits from customers. Different rules apply to lawsuits from employees.

III. Steps a Business Can Take to Minimize Risk

Communicate with your customers

How a business should communicate with its customers will be specific to each business. But generally, letting your customers know about all the steps you are taking to keep them healthy will allow customers to make informed decisions and, for those that decide to visit, feel more comfortable. A business owner can hope that a customer who has been assured of the safety measures that the business has taken would be less apt to sue.

You should warn customers of the risks of virus transmissions on the premises and the overall dangers of COVID-19. Your business should already have posters visible on site, but you can tailor additional communications to your customer base.

Some businesses are asking their customers to sign liability waivers. We go into this more in depth below, but this is another way to communicate the risks of contracting COVID-19 and discourage customers from suing. A waiver could be part of a document that also communicates everything that the business is doing to keep its customers safe and, depending on the business, shares expectation or requirements of its customers (e.g., face coverings).

While there are minimum communication requirements that you have as a business owner (e.g., the state's poster requirements), your overall communications strategy will be driven by your own sense of what will work best with your customers.

Establishing a good record of your safety measures is also something that your business should be doing in case you end up needing to defend a lawsuit or file an insurance claim. Good communication about the efforts that you are making to keep your customers safe will help you document those efforts.

To get started on preparing your communications, you may use this [Welcome Back Email](#) template and [Policies & Procedures](#) template provided by JPNDC. These templates were produced by JPNDC to address the worries of massage therapists as workers in a close contact industry. Please feel free to tailor them to become documents that work for your business.

Follow government and industry guidelines

Whether a business has met its "duty of care" depends on a number of factors, including the information available to a business at the time. In the context of COVID-19, the best information is coming from the local, state and federal guidelines. Business owners should continue to monitor government sources for information about the virus and the guidance on how to control its spread. Be sure to follow the latest protocols issued by the government.

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Following government protocols is the best place to start to protect yourself from liability and should be considered the minimum standard required to meet your “duty of care” to your customers. Ultimately, you as a business owner are responsible for determining what “reasonable” precautions look like for your business. If your business is in an industry that has developed best practices apart from government guidance, be sure to monitor and comply with the industry-recommended protocols as well.

You may refer to Step 1 of this [Steps to Reopen for Massage Therapists](#) template from JPNDC as a guide to following the state’s protocols by industry. This template was produced by JPNDC to help business owners, in this case massage therapists, to re-open their businesses in compliance with COVID-19 regulations.

Check your insurance coverage and legal entity

You can minimize the ability of a lawsuit (whether or not it has merit) to cost you money and/or disrupt your business by carrying effective liability insurance. Many liability policies call for your insurer to provide and pay for the legal defense of any suit related to the liability that the policy insures against.

You should check whether your liability insurance would cover a COVID-19 claim from a customer and the terms of the coverage. Many commercial general liability policies should provide coverage, though there are potential hurdles and relevant exclusions out there so you would need to review your policy to confirm. Even if you review the policy now, it could be hard to predict with certainty whether a future claim would be covered without knowing the particular facts and how insurers and courts end up answering questions of interpretation.

The good news is that if you get sued and it’s unclear whether the insurance would cover your liability, the insurer’s obligation to pay for your legal defense may still come into effect. The insurer’s “duty to defend” (i.e., to pay for and arrange a lawyer to defend a claim) is broader than the coverage of the payment of a claim under most policies. Generally under Massachusetts law, if there is a possibility that the insurer would need to pay out a claim under a policy, then most policies would require the insurer to cover that claim’s legal defense.

If you need help reviewing the policy, you should talk to your insurance broker or an experienced attorney. If you are sued, you would seek coverage under the policy by following the policy’s notice procedures. The notice section of the policy might also be called “duties in the event of occurrence, claim or suit.” If you get sued and need help finding an attorney, you can contact your local technical assistance provider (e.g., [JPNDC](#), [Boston Main Streets](#)).

If you are covered by insurance, it is also important to remember to keep your premium payments up to date and to keep a copy of the policy accessible.

Another important way to protect yourself from liability is your business's legal entity (e.g., corporation, limited liability company). A properly maintained legal entity protects your personal assets from the losses and liabilities of your business. To preserve the entity's ability to protect your personal assets, make sure to keep your business affairs separate from your personal affairs and look after your entity's formal documentation requirements. You can check to make sure that your entity is up to date on its annual state filings on the [website of the Secretary of the Commonwealth](#).

IV. Liability Waiver Considerations

You should consider both the pros and cons of asking customers to sign a liability waiver. Even if you use a waiver, you should be sure to follow the government and industry safety protocols. Don't let the use of a waiver give you the impression that you can't get sued or held responsible if someone gets sick.

Pros:

- Waivers might discourage customers from suing (both if they feel morally bound by their agreement not to sue or if they feel the waiver will hold up in court).
- There is a chance, though not a guarantee, that a waiver could be helpful legally in defending a lawsuit.
- For businesses that already ask their customers to sign a waiver, the COVID-19 waiver could be an easy addition.

Cons:

- It takes effort to draft a waiver, ask your customers (or their guardians) to sign one, and track who has.
- The request to sign a waiver could alarm some customers.
- A waiver is not guaranteed protection from lawsuits. You still have to defend the lawsuit (even if a court ultimately upholds the waiver).
- The waiver could give people on your team the wrong idea that the business is protected because of the waiver alone. Especially given the questions about enforceability of a liability waiver in this context, you need everyone to stay vigilant about complying with the government and industry guidelines.

If a customer who signed a waiver decides to sue you anyway, the waiver may help you dismiss the suit. A court may see the waiver and agree that the customer agreed to give up their right to sue you and that the waiver is enforceable.

However, whether a written waiver is enforceable depends on a number of factors. As a matter of contract law, courts will ask whether the waiver is clear and unambiguous. Even if the waiver is contractually sound, it cannot excuse behavior that is grossly negligent (which in the context of COVID-19, could be ignoring guidance or blatant virus risks).

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Courts can also decide that a waiver is not enforceable as a matter of public policy. In other words, even though someone freely and unambiguously gave up their right to sue, the court could decide to throw out the waiver because that person's ability to sue is important to the rest of society.

The ultimate answer of whether COVID-19 customer liability waivers are held to be enforceable will be determined by the courts over the following months and years.

If you choose to use a waiver, you may use this [Client Consent](#) template from JPNDC as a starting point to tailor, or to ask a lawyer to tailor, a liability waiver that works for your business.