

Release and Waiver of Liability (Potentially Dangerous Activity) (TX)

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A release of liability (commonly referred to as a liability waiver, a site visit agreement, exculpatory agreement, or a release and waiver of liability) governed by Texas law given or signed by a customer or member of the general public in connection with participation in an activity or a company's event, use of a company's services, or access to a company's facilities. This liability waiver is intended to protect the company against liability for claims of illness, injury, or death resulting from the customer participating in a potentially dangerous or hazardous activity. It contains a waiver of potential claims, covenant not to sue, an acknowledgment of assumption of risk, and an acknowledgment of voluntary participation, as well as an optional indemnification. This Standard Document has integrated notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

This waiver and release of liability is an instrument to be entered into:

- By a participant in a potentially dangerous or hazardous activity, typically a member of the general public, but can also apply in a business-to-business context (for example, when an employee of a commercial business customer participates in an on-site industrial training program).
- In favor of a service provider providing the services, opportunity, or venue to enable the participant to engage in the activity.

The participant signs the release of liability to absolve, exculpate, or forgive in advance the service provider of liability claims arising from the ordinary negligence of the provider (or its employees or agents). A release extinguishes a claim or cause of action and bars recovery on the released matter (*Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858, 867 (Tex. App.—Dallas 2009, pet. denied) (citing *Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex.1993))).

Activities for which service providers (including owners and operators of activity venues) may require liability waivers include, for example:

- Participation in physical therapy, sports, recreational, or related activities, such as snow skiing, skydiving, and whitewater rafting.
- Attendance at sports or entertainment events, such as car races and music concerts.
- Use of a gym, golf course, or similar venue.
- Access to company property to perform a business function, such as due diligence or an inspection.
- Participation in recreational or educational activities on agricultural land (Tex. Civ. Prac. & Rem. Code Ann. §§ 75A.001 to 75A.004).

This Standard Document provides a general template to assist in drafting a release of liability under Texas law. It is drafted in favor of the company seeking the waiver but aims to be reasonable. While it is drafted in broad terms to cover a wide range of circumstances, it must be tailored to reflect the particular activity

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as well as Texas law. Certain activities, for example, agritourism, have additional or special requirements that must be included when drafting a release of liability (Tex. Civ. Prac. & Rem. Code Ann. § 75A.004). Counsel should confirm whether the particular activity or industry for which the release is being drafted has any specific requirements.

In addition to release of liability, this Standard Document follows the common practice of including assumption of risk language under which the participant acknowledges that they are:

- Aware of the potentially hazardous nature of the specified activity.
- Voluntarily participating in that activity despite its hazardous nature.

This Standard Document also contains an optional indemnification provision in favor of the service provider.

For a sample liability waiver addressing the risk of infectious disease exposure, see [Standard Document, Release and Waiver of Liability \(Public Health Emergency\)](#). For a sample liability waiver addressing both the risk of injury from participating in a dangerous activity and the risk of infectious disease exposure, see [Standard Document, Release and Waiver of Liability \(Service Providers\)](#). For more information on liability waivers, see [Liability Waivers Toolkit](#).

For an overview of the enforceability of releases of liability, see [Practice Note, Enforceability of Liability Waivers: Overview](#).

Drafting Considerations

A liability waiver generally should be as short and informal as possible, written with clear language so that non-lawyers can fully understand the waiver. The waiver should plainly explain the risks associated with participating in the activity, as well as the rights the signer is agreeing to waive. A clearly written waiver:

- Allows participants to sign the release without additional explanation or discussion.
- Helps to avoid later questions of contract validity or enforceability.

Companies should also ensure that they have procedures in place to retain all original, executed

release agreements in a reliably secure location so that the documents can be promptly accessed when necessary.

Fair Notice Requirements

In Texas, a liability waiver or release (and, as stated in *Dresser Indus.*, 853 S.W.2d at 507, an indemnity agreement) that releases a party in advance for its own negligence must meet the fair notice requirements of both:

- **Conspicuousness.** The release must be written in such a manner that a reasonable person against whom it is to operate should have seen it. In other words, an agreement's release provisions must attract the attention of a reasonable person by its distinctiveness compared to the other language in the agreement. For example, language will be considered conspicuous if it is in:

- capital letters;
- bold type;
- contrasting font color; and
- larger size font.

(See *Dresser Indus.*, 853 S.W.2d at 510-11; see also *Reyes v. Storage & Processors, Inc.*, 86 S.W.3d 344, 348-49 (Tex. App. —Texarkana 2002), *aff'd*, 134 S.W.3d 190 (Tex. 2004)).

- **The Express Negligence Test.** The party's intent to be released from the consequences of its own negligence must be expressed clearly and unambiguously within the four corners of the release document (*Dresser Indus.*, 853 S.W.2d at 507-09).

For more information on Texas fair notice requirements, see 14 Tex. Jur. 3d Contracts § 204.

Assumptions

This Standard Document assumes that:

- **This Standard Document is governed by Texas law.** If the law of another state applies, this liability waiver may have to be modified to comply with the laws of the applicable jurisdiction.
- **The provisions of this Standard Document that specifically deal with the waiver and release of liability are intended to be made more conspicuous than other provisions in a commercial**

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agreement. Because disclaimers or restrictions of liability can significantly affect a party's rights under an agreement, lawyers typically differentiate the text of this language from that of other provisions to avoid a court voiding it for failing to be conspicuous enough for the affected party to notice. Additionally, depending on the nature of the transaction and the parties entering into the agreement, some states, like Texas, require that these provisions be made more conspicuous to be valid. Any risk-shifting provisions that provide for a release or indemnification from liability for that party's future negligence must meet the Texas fair notice requirements of the express negligence doctrine and conspicuousness (see Fair Notice Requirements).

- **The release is not being given in connection with the termination of a contractual arrangement or the settlement of a pending lawsuit.** For a sample release agreement to be used when the parties to a commercial contract are terminating or have terminated the contract (or a portion of it) and have agreed to deliver a mutual release of claims, see [Standard Document, Release Agreement \(TX\)](#). For a sample settlement and release agreement, see [Standard Document, Settlement Agreement and Release \(TX\)](#).

- **The release is being given by a US individual in favor of a US business entity, and the transaction takes place in the US.** If any party is organized or operates in or any part of the transaction takes place in a foreign jurisdiction, this liability waiver may need to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **This Standard Document is not industry-specific.** This liability waiver does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
- **This release is being used in a non-employment related context.** For a sample liability waiver for use by a company for employees engaged in employer-sponsored activities, see [Standard Document, Employee Liability Waiver and Indemnification Agreement](#).

Bracketed Items

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafting party's discretion.

RELEASE AND WAIVER OF LIABILITY AND ASSUMPTION OF RISK

The individual named below (referred to as "I" or "me") desires to participate in [ACTIVITY/ACTIVITIES] (whether singular or plural, hereinafter referred to as the "Activities") [provided by/sponsored by] [COMPANY NAME], a [STATE OF ORGANIZATION] [ENTITY TYPE] with offices located at [BUSINESS ADDRESS] (the "Company"). In consideration of [being permitted by the Company to participate in the Activities/the intangible value that I will gain by participating in the Activities] and in recognition of the Company's reliance hereon, I agree to all the terms and conditions set forth in this instrument (this "Release").

DRAFTING NOTE: PARTIES, ACTIVITIES, AND CONSIDERATION

This Standard Document is drafted to be executed:

- By an individual participant in that participant's personal capacity.
- For the benefit of the company that is providing the services, opportunity, or venue.
- To enable the participant to engage in the activity.

A release of this type generally is not executed by the service provider because it imposes obligations

and liability only on the participant. However, before using this document, counsel should confirm that the contract laws of the relevant state or states do not require both parties to execute the release.

In Texas, a contract does not need to be signed by both parties to bind the parties unless both signatures are required as a condition precedent to the formation of the contract (*Simmons & Simmons Constr. Co. v. Rea*, 286 S.W.2d 415, 417-18 (Tex. 1955); see also *DeClaire v. G &*

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B Mcintosh Family Ltd. P'ship, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (“a contract can still be effective if signed by only one party”). Courts look at the parties’ intent to determine whether or not a contract requires the execution of both parties (*New York Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 214-15 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); see also *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 209-10 (Tex. App.—El Paso 2004, no pet.)).

General contract formation principles of offer, acceptance, and consideration apply to liability waivers. For more information, see [State Q&A: Contract Basics for Litigators: Texas: Contract Formation](#).

The company should specify the activities to be conducted, which may include, for example, when the participant enters the company’s premises to:

- Participate in the specified sports or recreational instruction or competition.
- Participate in a self-defense class.
- Perform a business function, such as due diligence or an inspection.
- Provide volunteer services in support of nonprofit purposes.

- Receive certain consumer services from individuals or locations subject to state health and safety regulations, for example:

- tattoo studios;
- tanning facilities;
- massage therapy; or
- laser hair removal.

The activities to be conducted should be as specific as possible in the release to ensure enforceability. Specifying the activity provides evidence to help support the validity of the assumption of risk provision. The failure to specify the activity may raise the issue whether the participant could voluntarily participate in an activity that the participant did not understand. (See *Victoria Bank & Tr. Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (stating that claims that are not contained within the subject matter of the waiver are not released); see also *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 850 & n. 7 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (op. on reh’g) (collecting cases relating to enforcement of various release provisions and holding that a release of claims relating to certain agreements did not act as a release of unmentioned tort claims).)

I AM AWARE AND UNDERSTAND THAT THE ACTIVITIES ARE POTENTIALLY DANGEROUS ACTIVITIES AND INVOLVE THE RISK OF SERIOUS INJURY, DISABILITY, DEATH, AND/OR PROPERTY DAMAGE. I ACKNOWLEDGE THAT ANY INJURIES THAT I SUSTAIN MAY RESULT FROM OR BE COMPOUNDED BY THE ACTIONS, OMISSIONS, OR NEGLIGENCE OF THE COMPANY, INCLUDING NEGLIGENT EMERGENCY RESPONSE OR RESCUE OPERATIONS OF THE COMPANY. NOTWITHSTANDING THE RISK, I ACKNOWLEDGE THAT I AM VOLUNTARILY PARTICIPATING IN THE ACTIVITIES WITH KNOWLEDGE AND AN EXPRESS UNDERSTANDING OF THE DANGER INVOLVED AND HEREBY AGREE TO ACCEPT AND ASSUME ANY AND ALL RISKS OF INJURY, DISABILITY, DEATH, AND/OR PROPERTY DAMAGE ARISING FROM [MY PARTICIPATION IN] THE ACTIVITIES, WHETHER CAUSED BY THE ORDINARY NEGLIGENCE OF THE COMPANY OR OTHERWISE.

DRAFTING NOTE: ASSUMPTION OF RISK

The company includes this provision to provide evidence that the participant:

- Understood, before undertaking the activity:
 - the type of activity, in which the participant was about to engage; and

- the potentially dangerous nature and risks of the activity.

- Voluntarily participated despite understanding the risk.

These statements demonstrate that the participant was aware of the risks related to the activity and

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agreed to assume these specific risks, which increases the likelihood the release will be enforced. Courts generally require waivers to be clear and unambiguous to be enforceable. Including a specific reference to the hazards of the activity may help protect the company from liability in a personal injury lawsuit.

Texas has abolished the common law affirmative defense of assumption of risk. However, a party may use a person's express oral or written consent of assumption of risk before engaging in the risk to diminish or preclude recovery. (See *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 209-10 (Tex. 2015).)

In many states, companies increase the likelihood of enforcement if the acknowledgements are presented in large typeface, for example, in all capital letters or other typeface used to distinguish the provision from the other provisions of the agreement. While this is true in Texas for liability release provisions, the courts are not clear whether the same conspicuousness

requirements are applicable to assumption of risk provisions. For example:

- In *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 451 (Tex. App.—Dallas 2011, no pet.), the court held that the release met the fair notice requirements where the assumption of risk section was titled in bold caps, but the font of that section was regular type.
- In *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915, 919-21 (Tex. App.—Dallas 2013, no pet.), the court held that a release met the fair notice requirements where the assumption of risk provision was in regular font but other provisions and the title of the release itself were in bold font or capital letters.

Best practice in Texas includes, at a minimum, having the assumption of risk provisions in bold and all capital letters so they clearly stand out from the format of the other provisions in the document.

I HEREBY EXPRESSLY WAIVE AND RELEASE ANY AND ALL CLAIMS, NOW KNOWN OR HEREAFTER KNOWN, AGAINST THE COMPANY, AND ITS [OFFICERS,] [DIRECTORS,] [MANAGER(S),] EMPLOYEES, AGENTS, AFFILIATES, [SHAREHOLDERS/MEMBERS,] SUCCESSORS, AND ASSIGNS (COLLECTIVELY, "RELEASEES"), [ON ACCOUNT OF INJURY, DISABILITY, DEATH, OR PROPERTY DAMAGE] ARISING OUT OF OR ATTRIBUTABLE TO [MY PARTICIPATION IN] THE ACTIVITIES, WHETHER ARISING OUT OF THE ORDINARY NEGLIGENCE OF THE COMPANY OR ANY RELEASEES OR OTHERWISE. I COVENANT NOT TO MAKE OR BRING ANY SUCH CLAIM AGAINST THE COMPANY OR ANY OTHER RELEASEE, AND FOREVER RELEASE AND DISCHARGE THE COMPANY AND ALL OTHER RELEASEES FROM LIABILITY UNDER SUCH CLAIMS. [THIS WAIVER AND RELEASE DOES NOT EXTEND TO CLAIMS FOR GROSS NEGLIGENCE, WILLFUL MISCONDUCT, OR ANY OTHER LIABILITIES THAT TEXAS LAW DOES NOT PERMIT TO BE RELEASED BY AGREEMENT.]

DRAFTING NOTE: RELEASE

This section contains a release of claims arising out of the participant engaging in the activity, including those arising from the company's ordinary negligence. Absent a statute or public policy concern, exculpatory clauses that release a party, such as a service provider, from or limit its liability for its own ordinary negligence are generally enforceable in Texas and most other states (see *Ordinary Negligence Versus Gross Negligence*). However, the provision should:

- Expressly set out:

- the specific activities being participated in; and
- the claims to be released.

In Texas, for a release to be effective it must mention the claims being released. If the claims are not clearly within the subject matter of the release they may not be discharged. General categorical release provisions are afforded narrow construction by Texas courts. (*Victoria Bank*, 811 S.W.2d at 938; see also *Baty*, 63 S.W.3d at 850 & n. 7 (collecting cases).) To balance the expansive scope of this

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provision, the drafter should use language best suited for the types of claims or causes of action contemplated to be released by this agreement in relation to the specific activities being undertaken. When determining whether a release is enforceable, Texas courts will examine the entire agreement to determine whether the provisions:

- operate as intended; and
 - adequately address the fair notice requirements in compliance with state law.
- Be conspicuous. For more information, see the discussion of Conspicuousness in the Drafting Note, Fair Notice Requirements.
 - Expressly require the participant to “release” the company from liability.
 - Expressly exculpate the service provider from liability arising from its own “ordinary negligence.” For more information, see the discussion of the Express Negligence Test in the Drafting Note, Fair Notice Requirements.

Even if the provision contains express language releasing the service provider from its negligence, public policy concerns in Texas or another applicable state may arise and render an exculpatory clause unenforceable if, for example:

- The agreement concerns a public service (see, for example, *Crowell v. Hous. Auth. of City of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973)).
- The agreement is a standardized contract of adhesion offered to the plaintiff on a “take it or leave it” basis.
- Because of the agreement, the plaintiff was under the care and control of the party released from liability.
- The agreement is so one-sided that it is unconscionable under the circumstances existing when the parties entered into the contract.

Therefore, counsel should research applicable state law, including statutes, decrees, and case law, to determine whether public policy concerns threaten the enforceability of an exculpatory provision, which may depend on:

- The type of activity in which the participant is engaged.

- The type of services or venue provided by the service provider.
- The type of claim(s) being released or waived.
- The adequacy of notice allowing the released party to shift the risk of its own negligent conduct.

For example, in Texas, a majority of courts have held that a party may not be released from its own gross negligence (see [Practice Note, Negligence, Gross Negligence, and Willful Misconduct \(TX\): Standards for Gross Negligence](#)). For a discussion of the enforceability of releases regarding the claims of minors see [Drafting Note, Signatures of Parent or Legal Guardian and Witness](#).

The provision should also describe the released parties (the “Releasees”) with particularity and without ambiguity. In Texas, for a party to claim protection under a release, the release must refer to the party by name or with such descriptive particularity that the party’s identity is not in doubt (see *Quiroz v. Jumpstreet8, Inc.*, 2018 WL 3342695, at *3 (Tex. App.—Dallas July 9, 2018, pet. denied); see also *Headington Royalty, Inc. v. Finley Res., Inc.*, 623 S.W.3d 480, 495 (Tex. App.—Dallas 2021, pet. filed), reh’g denied (May 21, 2021) (finding that agreement did not contain such descriptive particularity so that the released party was readily identifiable)).

The bracketed language in the first sentence can be included to clarify that the release is limited to claims on account of injury, death, or property damage. Otherwise, it may be unclear whether the release is intended to cover other types of claims that the company intended to exclude because it is:

- Illegal to release those claims.
- Against public policy to release those claims. For example:
 - a majority of Texas courts have found it against public policy to release gross negligence claims (see [Practice Note, Negligence, Gross Negligence, and Willful Misconduct \(TX\): Standards for Gross Negligence](#)); and
 - intentional acts of the party seeking release are also an issue of public policy Texas courts have addressed, but have not settled (see, for example, *Brennan v. Kaufman*, 2021 WL 3729257, at *5 (Tex. App.—Houston [14th Dist.] Aug. 24, 2021, pet.

denied) (collecting authority for the proposition that “[g]enerally, a contractual provision ‘exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.’”) and *Cell Comp, L.L.C. v. Southwestern Bell Wireless, L.L.C.*, 2008 WL 2454250, at *6 (Tex. App.—Corpus Christi—Edinburg June 19, 2008, no pet.) (stating that it is contrary to public policy for a party to “prospectively exculpate itself from intentional torts by contract”).

Covenant Not to Sue

In addition to the release, the provision contains a covenant not to sue, which requires the participant to promise not to bring a claim against the company or any other releasee. The covenant not to sue works to protect the company in case the release is not effective. The provision also provides a release from any liability the company or any releasee may incur under those claims, if the participant breaches the covenant not to sue. For more information about the relationship between releases and covenants not to sue, see [Standard Document, Release Agreement \(TX\)](#), [Drafting Note: Covenant Not to Sue](#).

Ordinary Negligence Versus Gross Negligence

This Standard Document aims to limit the release to the service provider's ordinary negligence. Ordinary and gross negligence are not the same. The difference between ordinary negligence and gross negligence is the mental attitude of the defendant. (*Anderson v. Trent*, 685 S.W.2d 712, 714 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)) A party acts with ordinary negligence when it fails to exercise the degree of care that an objective reasonably prudent person would have used under similar circumstances. For more information, see [Practice Note, Negligence, Gross Negligence, and Willful Misconduct \(TX\)](#).

Since a majority of Texas courts do not enforce liability waivers for gross negligence or willful misconduct and because this release aims to be reasonable, this Standard Document does not purport to protect the service provider from liability arising from its:

- Gross negligence (see [Gross Negligence](#)).
- Willful misconduct (see [Willful Misconduct](#)).

The optional last sentence can be included to make clear that this release does not extend to claims for gross negligence, willful misconduct, or any other liabilities that Texas generally does not permit to be released by agreement.

Gross Negligence

To prove gross negligence, a plaintiff must show that the defendant was consciously or knowingly indifferent to the plaintiff's rights, welfare, and safety. In other words, the plaintiff must show that the defendant knew about the hazards or danger, but the defendant's acts or omissions demonstrated that the defendant did not care. (*Burk Royalty Company v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981).)

In Texas, gross negligence involves both an objective and subjective component as stated in case law and now codified in Texas law to reflect an act or omission:

- Which when viewed **objectively** from the actor's standpoint at the time of its occurrence involves an extreme degree of risk, considering both the probability and magnitude of the potential harm to others.
- Of which the actor has actual, **subjective** awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

(Tex. Civ. Prac. & Rem. Code Ann. § 41.001(11); see *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012); see also *Furniture Procurement Serv., LLP v. Nat'l Container Grp., LLC*, 2022 WL 2479922, at *5 (S.D. Tex. July 5, 2022); *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006) and *Burk Royalty*, 616 S.W.2d at 920.)

For more information, see [Practice Note, Negligence, Gross Negligence, and Willful Misconduct \(TX\): Standards for Gross Negligence](#).

Willful Misconduct

Courts generally view willful misconduct as behavior that is more egregious than either ordinary or gross negligence. However, Texas, and a few other jurisdictions, equate willful misconduct with gross negligence.

Texas courts have explicitly equated willful misconduct with gross negligence and judge it using the same standard (*Fath v. CSFB 1999-C1 Rockhaven Place Ltd. P'ship*, 303 S.W.3d 1, 6 (Tex. App.—Dallas 2009, pet. denied); see also *Reeder v. Wood Cnty. Energy, LLC*,

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395 S.W.3d 789 (Tex. 2012); *Turner v. Franklin*, 325 S.W.3d 771, 780 (Tex. App.—Dallas 2010, pet. denied) (recognizing that courts “have equated willful and wanton negligence with gross negligence”); *BP Oil Pipeline Co. v. Plains Pipeline, L.P.*, 472 S.W.3d 296, 312 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (identifying multiple Texas appellate courts equating willful misconduct and gross negligence)).

Earlier Texas cases linked willful misconduct with:

- Purpose and design.
- A specific intent to cause substantial injury to the plaintiff.

(*Burnett Ranches, Ltd. v. Cano Petroleum, Inc.*, 289 S.W.3d 862, 866 (Tex. App.—Amarillo 2009, pet. denied); *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 898 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).)

However, the Texas Supreme Court and, more recently, the Houston Fourteenth Court of Appeals, have clarified that willful misconduct **does not** require a subjective intent to cause actual harm. The standard only requires that a plaintiff shows that the evidence establishes that the defendant intentionally or deliberately engaged in improper behavior or mismanagement, without regard for the consequences of its acts or omissions. (*Apache Corp. v. Castex Offshore, Inc.*, 2021 WL 1881213, at *5 (Tex. App.—Houston [14th Dist.] May 11, 2021, no pet. h.) (citing *Mo-Vac Serv. Co. v. Escobedo*, 603 S.W.3d 119, 125-26 (Tex. 2020)).)

For more information, see [Practice Note, Negligence, Gross Negligence, and Willful Misconduct \(TX\): Overlap Between Willful Misconduct and Gross Negligence](#).

[I SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE COMPANY [AND ALL OTHER RELEASEES] AGAINST ANY AND ALL LOSSES, DAMAGES, LIABILITIES, DEFICIENCIES, CLAIMS, ACTIONS, JUDGMENTS, SETTLEMENTS, INTEREST, AWARDS, PENALTIES, FINES, COSTS, OR EXPENSES OF WHATEVER KIND, INCLUDING [REASONABLE] ATTORNEY FEES, FEES, THE COSTS OF ENFORCING ANY RIGHT TO INDEMNIFICATION UNDER THIS RELEASE, AND THE COST OF PURSUING ANY INSURANCE PROVIDERS, [INCURRED BY/AWARDED AGAINST THE COMPANY [OR ANY OTHER RELEASEES] [IN A FINAL [NON-APPEALABLE] JUDGMENT],] ARISING OUT OF OR RESULTING FROM ANY CLAIM OF A THIRD PARTY RELATED TO [MY PARTICIPATION IN] THE ACTIVITIES[, INCLUDING ANY CLAIM RELATED TO MY OWN NEGLIGENCE OR THE ORDINARY NEGLIGENCE OF THE COMPANY].]

DRAFTING NOTE: INDEMNIFICATION

This Standard Document contains an optional short-form indemnification provision, under which the participant agrees to indemnify the company and optionally, any other released parties, from any losses incurred resulting of the activities or optionally, participation in the activities. As drafted, this provision goes beyond a standard liability waiver, which merely exculpates the company for its own negligence, but does not require the participant to indemnify.

The company should carefully consider whether it wants to include this aggressive provision because it requires the participant to indemnify the company for any damages incurred by the company related to the activities, regardless of who is at fault, which may

include damages arising from the company’s own negligence.

Texas’ fair notice requirements (conspicuousness and the express negligence doctrine) are applicable to indemnification provisions that indemnify a party for its own negligence. Accordingly, if the company intends for this section to cover its own negligence, the language in this provision should both:

- Be sufficiently conspicuous to attract a reasonable person’s attention when looking at the face of the contract.
- Include the optional bracketed language at the end of the provision so that indemnification

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for the company's own negligence is clear and unambiguous.

(*Dresser Industries*, 853 S.W.2d at 508; see also Drafting Note, Fair Notice Requirements.)

Alternatively, the company can revise this provision to require the participant to indemnify only if the company incurs losses from the participant's negligence or reckless behavior.

In deciding whether to include this indemnification provision in the liability waiver, the company should consider that the practical benefits may be limited. For example, even if the company succeeds on an indemnification claim, it may be unable to collect

on its judgment if the participant does not have the assets to satisfy the judgment. The benefits of including this provision therefore may not outweigh the potential disadvantages, such as a participant refusing to sign the waiver because of the indemnification clause.

The indemnification provision does not require the participant to indemnify for direct claims. It only requires indemnification for third-party claims. For more information about indemnification provisions, see [Practice Note, Indemnification Clauses in Commercial Contracts \(TX\)](#) and [Standard Clause, General Contract Clauses: Indemnification \(TX\)](#).

[I hereby consent to receive medical treatment deemed necessary if I am injured or require medical attention during my participation in the Activities. I understand and agree that I am solely responsible for all costs related to such medical treatment and any related medical transportation and/or evacuation. I hereby release, forever discharge, and hold harmless the Company from any claim based on such treatment or other medical services.]

DRAFTING NOTE: MEDICAL TREATMENT

This optional paragraph allows the service provider to seek medical treatment for a participant if necessary. This provision:

- Documents the voluntary consent of and authorization by the participant to medical treatment.

- Expressly releases the company from any liability or costs stemming from medical treatment.

The written consent is generally presumed to be valid and effective absent proof that consent was induced by misrepresentation of material facts.

This Release constitutes the sole and entire agreement of the Company and me with respect to the subject matter contained herein and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter. If any term or provision of this Release or the application thereof to any party or circumstance is held invalid, illegal, or unenforceable to any extent in any jurisdiction, then the remaining terms and provisions of this Release and their application to other parties or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law. This Release is binding on and shall inure to the benefit of the Company and me and their respective successors and assigns. All matters arising out of or relating to this Release shall be governed by and construed in accordance with the internal laws of the State of Texas, excluding any conflict-of-laws rule or principle that might refer the governance or the construction of this agreement to the laws of another jurisdiction. Any claim or cause of action arising under this Release may be brought only in the federal and state courts located in [COUNTY], Texas and I hereby consent to the exclusive jurisdiction of such courts.

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DRAFTING NOTE: BOILERPLATE

This Standard Document addresses only a few important boilerplate issues, including:

- Integration.
- Severability.
- Successors and assigns.
- Choice of:
 - law; and
 - forum.

This provision notifies the participant:

- That there are no other documents or oral agreements, representations or warranties that cover the issue of the company's liability. For more information on integration, see [Standard Clause, General Contract Clauses: Entire Agreement \(TX\)](#).
- That the potential unenforceability of any part of the agreement does not affect the enforceability of any other part of the agreement. For more information on severability, see [Standard Clause, General Contract Clauses: Severability \(TX\)](#).
- That the release is binding on and inures to the benefit of the successors and assigns of the company and the participant. For more information on

successors and assigns, see [Standard Clause, General Contract Clauses: Successors and Assigns \(TX\)](#).

- Of the law that governs this agreement. For more information on choice of law, see [Standard Clause, General Contract Clauses: Choice of Law \(TX\)](#).
- Of the forum where any disputes arising from this agreement must be adjudicated. For more information on choice of forum, see [Standard Clause, General Contract Clauses: Choice of Forum \(TX\)](#).

The company may wish to add other boilerplate provisions such as those dealing with:

- Notice (see [Standard Clauses, Boilerplate Clauses \(TX\): Notices \(Long-Form\)](#)).
- Statutes of limitations, and the possible modification thereof (see [Standard Clause, General Contract Clauses: Contractual Statute of Limitations \(TX\)](#)). For more information about statutes of limitations in Texas generally, see [State Q&A, Statutes of Limitations: Texas](#).

For more information about boilerplate clauses, see [Standard Clauses, Boilerplate Clauses \(TX\)](#) and [General Contract Clauses: Boilerplate Clauses \(Short Form\) \(TX\)](#).

BY SIGNING BELOW, I ACKNOWLEDGE THAT I HAVE READ AND FULLY UNDERSTOOD ALL OF THE TERMS OF THIS RELEASE AND THAT I AM VOLUNTARILY GIVING UP SUBSTANTIAL LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE THE COMPANY, WITHOUT ANY INDUCEMENT, ASSURANCE, OR GUARANTEE BEING MADE TO ME. I [INTEND MY SIGNATURE TO BE THE REQUIRED EVIDENCE OF MY ASSENT TO] COMPLETELY AND UNCONDITIONALLY RELEASE ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW.

DRAFTING NOTE: ACKNOWLEDGMENT

The purpose of this boldface notice and acknowledgment is to limit the participant's ability to successfully argue that:

- The participant did not:
 - have a reasonable opportunity to review the provisions; or
 - understand what the participant was signing.

- The company otherwise had an unfair advantage against an unsophisticated participant signing the agreement in the participant's personal capacity.

(See, for example, *Van Voris*, 402 S.W.3d at 918-21.)

Generally, a party who signs an agreement is bound by its provisions, regardless of whether the party

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read it or thought it had different terms. However, an agreement may be invalidated if it is obtained by:

- Fraud.
- Misrepresentation.
- Deceit.

(*In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005).)

Therefore, the presence of an acknowledgment in a written release is not a guarantee that the releasing party cannot contest the validity of the release based

on the circumstances of its execution. The company should be mindful of these circumstances as well as the content of the document.

The drafter may consider including the optional bracketed language, the purpose of which is to limit a participant's argument that other conditions precedent were required for contract formation and the participant's intent to be bound. However, drafters should consider and weigh with the risk of potential counter-arguments if the original executed version or a legible copy cannot be produced as evidence.

Signed:

Printed Name:

Address:

Date: _____

[I am the parent or legal guardian of the minor named above. I have the legal right to consent to and, by signing below, I hereby do consent to the terms and conditions of this Release and Waiver of Liability and Assumption of Risk.

Signed:

Printed Name of Parent or Legal Guardian:

Address:

Date: _____

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[Witnessed:

Printed Name of Witness:

Address:

Date: _____]]

DRAFTING NOTE: SIGNATURES OF PARENT OR LEGAL GUARDIAN AND WITNESS

Because contracts with minors may be void or voidable under particular state law, a minor's parent or legal guardian should be required to also sign the waiver and release on the minor's behalf. In Texas, contracts executed by a minor are voidable at the minor's election and may either be:

- Disaffirmed by the minor.
- Ratified by the minor after the minor reaches majority.

(*PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 176 (Tex. App.—Houston [14th Dist.] 2014, no pet..))

The age of majority varies from state to state (age 18 is the most common). In Texas, the age of majority is 18 years (Tex. Civ. Prac. & Rem. Code Ann. § 129.001).

While not necessary in Texas, to further increase the likelihood that the waiver and release is enforceable in other relevant states, a company may require the participant's (and a minor's parent's or legal guardian's) signature to be formally witnessed. This optional statement and related signature blocks can be included if necessary to obtain the signatures of a participant's parent or legal guardian and a witness.

Counsel for the company, however, should research the enforceability of parental waivers, which varies from

state to state. In Texas, the issue of enforceability of parental waivers has not been conclusively resolved. Such waivers may be enforceable where they concern claims for past and future medical bills until the child reaches 18, which are covered by the parent's duty to support the child (Tex. Fam. Code Ann. § 151.001(a)(3)).

However, damages for the experience of physical pain and limitations, as well as future medical bills incurred after the age of majority, could be considered personal to the child, and therefore may not be waivable as a result of a parent executing a preinjury waiver and release on behalf of a minor. For example:

- In *Munoz v. Il Jaz, Inc.*, 863 S.W.2d 207, 209-10 (Tex. App.—Houston [14th Dist.] 1993, no writ), the court suggested, in dicta, that parents did not have authority to waive claims affecting a child's rights.
- In *Paz v. Life Time Fitness, Inc.*, 757 F. Supp. 2d 658, 662-63 (S.D. Tex. 2010), the court, relying, in part, on *Munoz*, found waivers of minor's claims unenforceable, however, such finding is not controlling authority.
- Tex. Fam. Code § 151.001(a)(7), however, grants parents authority to make decisions of substantial legal significance concerning the child.

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