

## Recreational Activity Waivers Aren't Child's Play *by Matt Breeden*

**E**xculpatory contracts, also known as waiver and release agreements, or just simply waivers, as we'll refer to them in this article, are the most valuable arrow in the quiver of recreational activity providers when faced with negligence claims. Across the country recreational activity providers (e.g. health clubs, race tracks, rock climbing classes, swimming pools, etc.) require participants to sign thousands of waivers every day. The enforceability of these waivers is governed by state law and varies widely from state to state. Some states, such as California and Indiana, take the position that waivers are generally enforceable contracts and do not violate public policy. However, a minority of states like Wisconsin take a very different view. In Wisconsin, waivers are not favored by the law, as they are viewed to commonly violate public policy, primarily due to the inability of the waiving party to negotiate the contract's terms. That is not to say that they are never enforced, but the standard is much higher than in jurisdictions such as Indiana and California.

The status of waiver laws throughout the country is outside the scope of this article, but it is enough to understand that the laws vary widely from state to state and counsel should be engaged whenever a waiver is needed in a new jurisdiction. Fortunately for recreational activity providers in Indiana, a properly drafted and executed waiver should be a complete defense to claims of negligence. The key is "properly drafted and executed." What does this mean, you ask? There are several elements that create a properly drafted waiver. In the next few paragraphs we'll cover some of the most important ones.

First and foremost, the language of the waiver must be clear and unambiguous. Thus, legalese should be avoided and the document should be clear and concise. In most instances this means that the waiver should not include lengthy or duplicative paragraphs, instead focusing on succinctly and conspicuously calling the reader's attention to that which is being released and waived. Remember, the signors of waivers generally do not spend much time reading the waiver. It is therefore imperative that the document is written in such a manner that it can be read and understood by a common participant in a relatively short amount of time. More specifically, the releasing language of the agreement be in bold or all capital letters, so as to stand out from the rest of the document.



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With respect to the actual language of the waiver, the agreement should clearly warn the participant of the risks associated with the activity, including "permanent disability or death" on the list. Further, it should be made clear that the waiver applies to all risks associated with the activity, both "known and unknown." It is important that "known and unknown" risks are included, as a waiver which specifically lists certain risks will by its nature leave out uncommon or unprecedented risks, which could lead to liability for the recreational activity provider if they are not included.

Indiana, unlike many other states, does not differentiate between levels of negligence. "Gross negligence" is not a standard recognized by Indiana courts. As such, when drafting waivers it is important to state that the release applies to "negligence", as a waiver will not effectively release a party from willful or wanton conduct. Additionally, while waivers drafted for one jurisdiction should not be used for another jurisdiction without the approval of counsel, it is recognized that this is not always practical. To combat this risk, as well as the risk that waiver laws may change during the period which the waiver is used, the release should be apply to "the fullest extent permitted by law." This will help to avoid the situation in which an entire waiver is invalidated due to the overreaching nature of a few phrases.

Finally, there are some physical features of the waiver, which can make it easier to understand. For one, the waiver font should be at least 10-point, with headings of at least 16-point, and limited to a single page when possible. Ideally the participant would be provided with the waiver in advance of participation, but this is not possible in many situations. As such, it is helpful if the environment in which the individual is executing the waiver is physically separated from the recreational area, such that the participant is not distracted while reading and executing the waiver.

One issue which was not discussed in this article, but is important to note is that the foregoing discussion only applies to waivers executed by adults. Waivers executed by minors, whether on their own or by their parents/guardians, are subject to considerably more scrutiny, as minors are not generally capable of entering into binding contracts and public policy concerns may prevent a parent/guardian from binding a minor to a waiver.

Clearly the elements outlined in this article are not all encompassing, but they are some of the most imperative. While we all hope that accidents will not occur, the fact is that they do happen. If your company, organization or club presently utilizes waivers, plans to do so in the future or is concerned they should be doing so now, I recommend that you consult with competent counsel. I welcome your calls and emails, and can be reached at 317-632-3232 or [mbreeden@dannpecar.com](mailto:mbreeden@dannpecar.com). To read more of my articles, please visit my personal website: [SportsLawGuru.com](http://SportsLawGuru.com). **D**

# COBRA MODIFICATIONS IMPACT EMPLOYERS AND EMPLOYEES

by Mark Waterfill and Raegan Gibson

**T**he Consolidated Omnibus Budget Reconciliation Act, better known as COBRA, has undergone some temporary but major changes as a result of the American Recovery and Reinvestment Act of 2009 (the "Act"), which was passed on February 17, 2009. In an effort to encourage economic investment, the Act provides for a COBRA premium reduction and additional COBRA election opportunities for qualified individuals. These changes are already in effect and have a very real impact on both employers and employees.

## The COBRA Premium Reduction

Pursuant to the Act, individuals who have been involuntarily terminated from their employment between September 1, 2008 and December 31, 2009 may be eligible to receive a 65% reduction on their COBRA premiums for up to nine months. In order to qualify, these individuals must be a COBRA qualified beneficiary; must be eligible for COBRA continuation coverage, must elect COBRA coverage when it is first offered or during the additional election period provided by the Act (which is described below), and cannot be eligible for any other group health coverage or Medicare. These individuals, formally known as "assistance eligible individuals," qualify regardless of whether they were terminated for financial reasons or for cause. However, termination for gross misconduct may prevent qualification.

Individuals who qualify for the premium reduction will only be responsible for 35% of their COBRA premium. This premium subsidy is not considered taxable income. However, there is a phase-out of eligibility, which will increase some high-income individuals' tax liability. For individuals with incomes

between \$125,000.00 and \$145,000.00 (single) or \$250,000.00 and \$290,000.00 (joint filers), a portion of the premium subsidy for the taxable year must be repaid. For individuals with incomes higher than \$145,000.00 (single) and \$290,000.00 (joint filers), the entire premium subsidy for the taxable year must be repaid.

If a group health plan offers multiple coverage options to its employees, the employer may allow qualified individuals to change the coverage they had when they became eligible for COBRA. These individuals will retain their right to the premium reduction as long as new coverage has the same or lower premium as the original coverage and is not coverage that provides only dental, vision, a health flexible spending account, or coverage for treatment that is furnished in an on-site facility maintained by the employer.

The premium reduction is generally available under all group health plans including medical, dental, and vision coverage. It applies to group health plans sponsored by private-sector employers or employee organizations subject to COBRA rules under the Employee Retirement Income Security Act of 1974 (ERISA). It also applies to plans subject to continuation requirements under the Public Health Service Act and the Federal Employee Health Benefits Program (FEHBP). Finally, it applies to group health insurance required by State law to provide comparable continuation coverage.

Employers (or, other entities to which the premium is payable, i.e. multi-employer health plans or insurers) are responsible for paying the remaining 65% of the COBRA premium. They are eligible for a reimbursement of all subsidy amounts paid and may recover those amounts by taking them as a credit against their payroll tax liability using their IRS Form 941. If the subsidy amount exceeds payroll tax liability, the employer (or other entity) may apply the overage to its next return or request a refund. If the employer (or other entity) has unpaid employment or income tax claims, however, the Internal Revenue Services will offset the unpaid claims prior to issuing the refund.

## The Special COBRA Election Opportunity

For all qualified individuals who were involuntarily terminated from September 1, 2008 through February 16, 2009, there may be special COBRA election opportunities. If any of these individuals failed to elect COBRA when it was first offered or elected COBRA when it was first offered but are no longer enrolled, they are entitled to an additional election opportunity. This special election period began on February 17, 2009 and ends sixty days after the individual's health plan provides the

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## SIX DPNK LAWYERS WERE INCLUDED IN THE 2009 "SUPER LAWYERS" LIST

Dann Pecar Newman & Kleiman, P.C., is proud to announce that Norman R. Newman (Real Estate), David H. Kleiman (Bankruptcy & Creditors'/Debtors' Rights), James P. Moloy (Bankruptcy & Creditors'/Debtors' Rights), Jeffrey A. Abrams (Real Estate) and James H. Schwarz (Real Estate) have earned the 2009 *Indiana Super Lawyers'* designation awarded by *Law & Politics*. In addition, Michael A. Lang (Real Estate) was selected in 2009's *Indiana Rising Stars*. David H. Kleiman was also recognized in the *Top 50* list of attorneys that received the highest point totals during the nomination, research and blue ribbon review process.

*Indiana Super Lawyers* is a joint project of *Law & Politics Magazine* and *Indianapolis Monthly Magazine*. It is a listing of outstanding lawyers from more than 50 practice areas who have attained a high degree of peer recognition and professional achievement. Only five percent of the licensed active attorneys in Indiana, as chosen by their peers, are named to the *Super Lawyers* list and only 2.5% are listed in *Rising Stars*. In 2007, over 34,000 lawyers participated in the nomination and evaluation processes. **D**

## Andrea Hermer Appointed to Junior Achievement of Central Indiana Board of Directors



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Dann Pecar Newman & Kleiman is pleased to announce that shareholder Andrea Hermer has been appointed to the Board of Directors of Junior Achievement ("JA") of Central Indiana, Inc. ("JACI"). JA is the world's largest organization dedicated to inspiring and preparing young people to succeed in a global economy by promoting experiential learning techniques to address financial literacy, work-readiness, and entrepreneurship. Andrea is excited about the opportunity to become more involved with JACI, whose mission she finds particularly important in today's business and economic environments. JACI was established in 1957 and has served nearly 1 million children since opening its doors. JACI offers a variety of creative experiential learning programs for students in grades K-12. JA BizTown, one of many JACI programs, is a fully interactive, simulated town where students are immersed into their own free enterprise community. Think of a class of 5th grade students running a bank, managing a restaurant, and reading utility meters and you will have a glimpse into the dynamic learning environment students experience in JA BizTown. As part of her JA experience, Andrea also looks forward to working with a variety of entrepreneurs within the Central Indiana business community. JA and its programs are housed in the Gene B. Glick Junior Achievement Education Center, which is a unique state-of-the-art learning center which serves as a model for other JA organizations worldwide. For those who are interested, please contact Andrea to learn more about JACI, its programs, or if you would like a tour of the Gene B. Glick Junior Achievement Education Center. JACI is a valuable part of Central Indiana's business community which continues to provide innovative leadership. You may also visit [www.jaindy.org](http://www.jaindy.org) for more information about JACI and what it has to offer to you, your business, and families. **D**

*COBRA continued from previous page*

new COBRA notice required under the Act (which notice should have been provided no later than April 18, 2009 and is discussed below). COBRA coverage elected during this special period runs from the first period of coverage beginning on or after February 17, 2009. This special election period does not extend the period of COBRA continuation coverage beyond the original coverage period; which is generally eighteen months from involuntary termination.

### The New COBRA Notice Requirements

Group health plans and issuers are now required to provide notice of the premium reduction to all individuals who have a COBRA qualifying event between September 1, 2008 and December 31, 2009. These individuals should be provided with notice regardless of whether they have COBRA coverage. Unless modified by the Act, the general manner and timing requirements for COBRA notice continue to apply.

Notices should generally include premium reduction eligibility forms; plan administrator contact information; a description of the special election period described above (if applicable to that individual); a description of disqualification events (such as eligibility for coverage under another plan or Medicare) and the notice requirements and penalties related to an event of disqualification; a description of premium reduction eligibility requirements and the right to receive the premium reduction; and, when applicable, information on the right to enroll in different coverage options. The Department of Labor maintains model notice forms on their website, which can be accessed at <http://www.dol.gov/ebsa/cobra.html>.

If you have any questions about the new COBRA changes or need assistance with implementing those changes, please contact Mark Waterfill ([mwaterfill@dannpecar.com](mailto:mwaterfill@dannpecar.com)) or Raegan Gibson ([rgibson@dannpecar.com](mailto:rgibson@dannpecar.com)), or call 317-632-3232. **D**

# NEWS of the FIRM:



*Kristen Edmundson was a group leader and Andrea Hermer a presenter at the Indianapolis chapter of Commercial Real Estate Women (IndyCREW) Careers event. This event is an annual event which introduces and promotes careers in commercial real estate to young women. Andrea spoke and presented materials to the girls on the topic of redevelopment of property for office use. Kristen led a group of 8th grade girls through a simulation of the process of redevelopment of the former Indianapolis Airport Terminal. Kristen's group won the competition with their detailed plan for a mixed-use "Aqua-Tel Family Resort" -- including Aquarium, Indoor/Outdoor Waterpark, Hotel, Conference Center, Restaurants, and Retail.*

*Jim Moloy recently spoke at a seminar on motorsports law hosted by TRAC, The Racing Attorney Conference. Mr. Moloy, who formerly represented Champ Car, discussed the potential bankruptcy issues that may confront participants in the motorsports business.*

*James H. Schwarz was recently nominated and will be elected as Vice-President-Treasurer of the Jewish Federation of Greater Indianapolis, Inc.*

*Andrea Hermer gave a presentation to the local real estate management services group of Colliers Turley Martin Tucker on the topic of communications issues impacting multi-tenant property.*

*Norman R. Newman is listed in 2009's "Best Lawyers in America, Who's Who in America, and Who's Who in American Law." *

RSVP

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## Upcoming DPNK Seminars

June 2, 2009

*"Current Challenges in Local  
Government Law"*

Capital Conference Center  
201 N. Illinois, Indianapolis

9:00 a.m. - 4:30 p.m.

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[www.nbi-sens.com](http://www.nbi-sens.com)

Featured speaker

Mark R. Waterfill

DPNK

June 11, 2009

*"Medical Records Law"*

Crowne Plaza, Bloomington  
1710 Kinser Pike

Bloomington, Indiana

9:00 a.m. - 4:30 p.m.

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Featured Speaker

Mark Waterfill

DPNK

August 13, 2009

*"Medical Records Law"*

Location TBA

9:00 a.m. - 4:30 p.m.

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Featured Speaker

Mark Waterfill

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