



## Economic Affairs Interim Committee

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### 66th Montana Legislature

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June 30, 2020

To: Economic Affairs Interim Committee Members

From: Jameson Walker, Staff Attorney

Re: Business waivers relating to COVID-19

I was asked to provide information relating to business liability waivers and Montana law. Please note that this memo is preliminary in nature; further analysis can be provided upon request.

At present, approximately six states have passed measures allowing businesses to require customers sign waivers. The waivers basically provide that the customer agrees to not file a lawsuit against a business if they contract coronavirus. The states include North Carolina, Utah, Louisiana, Oklahoma, Arkansas, and Alabama.

Montana has several statutes relating to liability waivers. The primary statute is found in 28-2-702, MCA. This statute provides that liability waivers are generally against the policy of the law:

**28-2-702. Contracts that violate policy of law - exemption from responsibility - exception.** Except as provided in 27-1-753, all contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.

The Montana Supreme Court has addressed this statute and iterations of this statute on numerous occasions. In summary, the Court has held that outright liability waiver agreements are in contradiction to 28-2-702. However, the Court has held that liability agreements that limit liability are not per se illegal under the statute. Below are case summaries pertaining to this statute:

*Contract Limiting Liability Between Businesses — Enforceable:* A contract containing a clause that limits liability, rather than eliminates liability, between two business entities that have equal bargaining power does not violate this section. *Zirkelbach Constr., Inc. v. Dowl, LLC*, 2017 MT 238, 389 Mont. 8, 402 P.3d 1244.

*Pre-Injury Release Form:* The trial court committed reversible error by granting summary judgment to defendant employer on the basis of a pre-injury release form signed

by the plaintiff. The fact the waiver is a private contract is not determinative in this case. Such waiver is invalid and violates public policy if it seeks to exempt one from liability for those actions specified in 28-2-702. *Miller v. Fallon County*, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

*Specific Indemnity Clause in Lease:* A specific indemnity clause in a lease agreement between a railroad and a lessee, which clause provided that the lessee would indemnify the railroad for claims "whether due or not due to the negligence" of the railroad, was not invalid as applied to the allegations in a complaint by a person seeking recovery from the railroad for injuries allegedly received because of a violation by the railroad of 69-14-562 (now repealed), making it a misdemeanor for a railroad to permit a locomotive to approach a crossing without giving a proper warning. *Ryan Mercantile Co. v. Great N. Ry.*, 186 F. Supp. 660 (D.C. Mont. 1960), affirmed in *Ryan Mercantile Co. v. Great N. Ry.*, 294 F2d 629 (9th Cir. 1961).

*Exception — Where Illegal Contract Enforceable:* Where refusal to enforce an illegal contract would have harmed the parties for whose protection the law was enacted, in this case the taxpayers, enforcement was allowed where the County Commissioners allowed a bondsman to execute a note to postpone his payment under a depository bond securing county funds in an insolvent bank, in violation of Art. V, sec. 39, 1889 Mont. Const. (similar to Art. II, sec. 31, 1972 Mont. Const.), and the county could enforce payment of the note. *Fergus County v. Osweiler*, 107 M 466, 86 P2d 410 (1938), distinguished in *McFarland v. Stillwater County*, 109 M 544, 98 P2d 321 (1940).

*Limitation of Actions:* A stipulation by a telegraph company, on one of its blanks, that it will not be answerable for damages or statutory penalties if a claim is not made within a specified time, is void under this section as against public policy, if it was ever intended as a cloak for fraud or crime. *Lahood v. Cont. Tel. Co.*, 52 M 313, 157 P 639 (1916).

*Exemption From Liability:* A provision in a contract to exempt another from liability for violation of law is void as contrary to public policy. Since the provision was not severable, the entire contract was void. *Cooper v. N. Pac. Ry.*, 212 F 533 (D.C. Mont. 1914).

Thus, while liability waivers aren't outright prohibited by 28-2-702, the statute and interpretation by the Montana Supreme Court has generally restricted their application.