

RISK TRANSFER SUGGESTED PRACTICES

Common practices such as leasing space to tenants, subcontracting for maintenance, repair or other services, or even allowing vending machines on your property can bring unexpected risk. Fortunately, there are actions you can take to minimize exposure to unnecessary risk, and to shift the risk of loss to the responsible party. This is known as "risk transfer," and it is commonly accomplished by written contract.

By following the practices outlined in this bulletin, you may be able to reduce your chances of unknowingly taking on someone else's liability or being exposed to additional liabilities due to the actions of others.

These suggested practices are divided into three categories:

1. Certificates of Insurance
2. Written Contracts and Agreements
3. Record Keeping

I. Certificates of Insurance

1. Require Certificates of Insurance from Subcontractors, Tenants, and Service Providers

You can require that subcontractors, tenants, and service providers (e.g., plumbers, landscapers, cleaning services) provide you with Certificates of Insurance for any insurance coverage appropriate to your circumstances -- four common types include Workers' Compensation, Commercial Automobile Liability, Property, and General Liability -- **before** starting any work or lease. This can be done annually for multi-year relationships. Use of uninsured contractors, tenants and service providers should be avoided.

Accepting Certificates of Insurance from the insurance company or agent only, not directly from the subcontractor, tenant, or service provider, can help protect against receipt of false certificates.

Why are Certificates of Insurance important?

A current Certificate of Insurance does not transfer risk, but it does provide evidence of existing insurance. If you don't request them, here's what can happen:

- You may discover later that the subcontractor, tenant, or service provider has no insurance at all..
- You may discover later that the subcontractor, tenant, or service provider does not have a type of insurance coverage or limits appropriate under the circumstances.
- You or your insurance may have to pay for all or part of losses arising from the subcontractor's, tenant's, or service providers' actions, from which you might otherwise have been shielded.

2. Review Certificates of Insurance

Review Certificates of Insurance upon receipt and annually for multi-year relationships. The purpose of the review is to verify the existence of coverage and to determine whether existing coverage limits are adequate and meet the requirements of your agreement.

The review process should be organized so that it is a routine function performed by administrative personnel. A checklist can be

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developed for this purpose. Establish and document procedures to follow when certificates are not received or the information is not in accordance with requirements established in your agreement. A letter seeking the needed changes should be sent to the other party and should be followed up until a current certificate meeting all requirements is received. The certificates should be maintained in your file for the subcontractor, tenant, or service provider for future reference.

3. Enforce Certificate of Insurance Requirements

You should consider using specific measures to encourage adherence to Certificate of Insurance requirements.

These measures may include actions that, with the advice and assistance of legal counsel, can be contracted for, such as:

- Not allowing services to begin until satisfactory evidence of compliance is received.
- Withholding payment for services until satisfactory evidence of compliance is received.
- Terminating the contract unless satisfactory evidence of compliance is provided within a specified time period.

4. Determine Appropriate Coverage(s) and Limits

Determine the appropriate coverage(s) and the minimum amounts of insurance you will require from your subcontractors, service providers and tenants. When establishing insurance requirements, it's important that you first determine what an adequate level of protection is for you. You should consult your own, retained insurance advisor and legal counsel

when determining adequacy of insurance requirements in your specific situation.

Some factors to keep in mind are the type of work involved, the value of your property and building(s), and the potential for the other party to cause losses.

5. Monitor Certificates of Insurance

Establish a reminder system that alerts the employee responsible for reviewing the certificates of upcoming policy expiration dates and target dates for compliance with any deficient items.

Once a contract, lease, or purchase order containing insurance requirements and enforcement provisions is executed, a system is needed to monitor the other party's continued compliance with the requirements. A simple example of a reminder system is a follow-up file or log that is sorted based upon insurance policy expiration dates or target compliance dates. This will allow for easier retrieval and follow-up each month.

This reminder system should include a procedure for reordering Certificates of Insurance prior to policy expiration dates. A form letter can be created and sent to all appropriate recipients at least 60 days prior to the expiration date. This procedure will help ensure that the coverages and limits you contracted for at the beginning of the relationship to protect your business are maintained throughout the course of the project, lease, or other relationship.

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6. Create a Certificate of Insurance Filing System

Once an appropriate certificate is received, consider keeping a copy in each of the suggested files:

Project file - Each project file should contain a current Certificate of Insurance certifying the coverages, limits, and endorsements for subcontractors.

Alphabetical file - Maintain records for your "core" subcontractors and service providers. You can also include any selection or pre-qualification documentation.

Expiration file - Maintain records for your "core" subcontractors and service providers based upon insurance policy expiration dates. This will allow for easier retrieval and follow-up each month.

II. a. Written Agreements and Contracts (That You Ask Others to Sign)

1. Written Agreements for Subcontractors and Service Providers

Securing signed, written contracts from your subcontractors, tenants, and service providers before they begin work or their lease starts can prove very beneficial to enforcing the terms of your agreements. Oral contracts, handshake deals or "gentlemen's agreements" can be difficult and costly to enforce. In many cases, participants to unwritten agreements may have different recollections of the terms thereof.

A written contract can, among other things, define the parties' responsibilities in regard to insurance, indemnity, tools and materials to be used, safety requirements, and other aspects of the business relationship.

The following two sources provide standard subcontractor agreements:

Associated General Contractors of America
1957 East Street, NW
Washington, DC 20006
703-548-3118
<http://www.agc.org/>

American Institute of Architects
1735 New York Ave., NW
Washington, DC 20006
1-800-365-2724
<http://www.aiaonline.com/>

It is important that your legal counsel review all of your written contracts to ensure that they adequately protect your interests and are tailored to your specific situation. Use of form contracts without consulting a competent legal professional and without consideration of your particular circumstances can lead to unexpected and undesirable results.

2. Review all Documentation Submitted for Correctness Before Work Proceeds or Commencement of the Lease.

Designate appropriately trained personnel within your organization who will be responsible for reviewing certificates of insurance and signed contracts, leases or purchase orders. Your legal counsel can help provide review guidelines for such personnel. It is important that assigned personnel review and approve all certificates of insurance and signed contracts, leases, and purchase orders **before any work begins or any lease commences**. All too often, certificates of insurance, contracts, leases and purchase orders are received but not reviewed until after an incident occurs which calls into question the terms thereof.

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II. b. Written Agreements and Contracts (That You Are Asked To Sign)

1. Carefully Review Contracts Before Signing

Designate people with the authority to sign contracts in your company. Have contracts reviewed by legal counsel and your retained insurance advisor before signing them.

Evaluate the risk you are taking on in light of the value of the contract as a whole. Is the business you receive worth the potential liability you assume? Can you do business with the other party without assuming as much liability?

2. Contract Review Checklist

In order to assist your legal counsel and insurance advisor in their review of your written contracts, a contract review checklist can be developed and completed to uncover questionable provisions. The completed checklist should be included with the contract for review by your insurance agent and legal counsel. Appropriate action regarding any unfavorable provisions can then be taken following such review.

3. Additional Insured Status - Primary or Excess

One issue to be on the lookout for, regardless of which party requests it, is whether additional insured coverage is primary or excess. This could be addressed in either or both of the written contract and the related insurance policies.

4. Legal Counsel Review of Hold Harmless/Indemnity Agreements

Have Indemnification/Hold Harmless Agreements reviewed by legal counsel, whether you are giving or receiving indemnification. This is money well spent to prevent unwanted consequences and unnecessary expense to you later.

Typically, when indemnification agreements are in place, one party agrees to protect the other party against damage, loss or liability, i.e. to hold them harmless. The company that agrees to provide this protection is the "indemnitor." The company that gets the protection is the "indemnitee." These contracts represent an attempt to clarify up front who will assume what liability. If you're not careful, you may find that you have assumed more than your share, or worse yet, all of the liability when a costly incident occurs.

III. Recordkeeping

Documentation

Retain purchase orders, leases, other contracts, and certificates of insurance in accordance with all applicable law and regulations in the jurisdictions and industries in which you operate. Consult your legal counsel for information and advice concerning any laws and regulations applicable to you.

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