

Tips for how to best protect your business

Introduction:

Contracting or outsourcing is a common business practice. When a subcontractor is hired to complete any work, activity, or service for a company, the organization takes on some or all liability for that contractor's operations. This includes subcontracting an installation or service, all construction services within a facility, and even something as simple as snow removal. Should an incident arise, that causes bodily injury or property damage to a contractor's employee, contracted workers, or the general public; liability should transfer to the party who has the most control over the exposures that could cause a loss. However, liability often transfers to the party with the least leverage in the contract. Business owners usually try to transfer liabilities to the contractor performing the service. Servicing contractors then transfer liability to their sub-subcontractors. The same scenario applies to manufacturing production subcontracting agreements or outsourced services.

Selecting qualified contractors and vendors is key to: maintaining a safe work environment, production or installation quality, and controlling liability. Accidents may still occur. In the event of an incident, Risk Transfer mechanisms are vital and allow a firm to shift its liability to another party. **As laws vary from state to state, seek legal counsel on the validity and use of Risk Transfer controls discussed below for your specific state.**

Risk Management Techniques: How to Protect Your business operation and your commercial insurance policy

Certificates of Insurance:

A Certificate of Insurance provides proof that a contractor has insurance coverage, limits of liability for various types of coverage, expiration date for the coverage, and the party underwriting the coverage. However, unless explicit language is provided in the insurance policy, coverage may be canceled at any time without notice to the certificate holder, emphasizing why certificates alone are not a guarantee of coverage.

Have you ever reviewed a Certificate of Insurance? Common language includes: *"This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend, or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), insured(s), authorized representatives or producer, and the certificate holder."*

Ultimately, certificates are a piece of paper that shows an individual or business had insurance when it was issued.

At a basic level, companies believe obtaining a Certificate of Insurance is enough. But, while important, it shouldn't constitute your sole method of risk management.

Work orders and purchase orders:

Often work orders or purchase orders are used instead of a written contract. These orders typically contain boilerplate language and should not be used as a substitute for a formal written contract.

This is why a written contract is invaluable!

Written contracts:

A more effective risk management method involves using a formal written contract between your company and the subcontractor. A contract is one of the most important risk transfer tools available to you as it sets forth the responsibilities of your company and the subcontractor. The contract establishes the responsibility and duties of both parties, what is agreed upon in terms of scope of work, payment for completed work, timeframe for completion, and other details. In a loss situation, the insurance company can use this contract to partially or fully limit liability.

The written contract should include the following elements:

- **Indemnification Clause** – This states the subcontractor agrees to indemnify your company, its agents, employees, and customers for any expenses, damages, or losses arising from work performed by the subcontractor.

This section should clarify the indemnification that expenses or damages are only due to a breach of contract, not necessarily ANY expenses, damage, or loss.

Other Things to Consider:

- ✓ Prohibit any completed operations exclusions on the subcontractor's insurance policy.
- ✓ Provide language that provides Stop Gap coverages from work in a monopolistic state.
- ✓ Require the subcontractors to provide USL&H policies if such an exposure exists.

- ✓ Require the subcontractor to provide 30 days advance written notice for cancellation of any insurance policies to the Owner.
- ✓ Include in the contract insurance language covering any subcontractors of subcontractors.
- **Hold Harmless Agreement** – States your subcontractor agrees to hold your company harmless against all general expenses, legal expenses, damages, or loss arising from work performed by the subcontractor. **Hold Harmless language needs to be specific to state contract laws.**
- **Additional Insured.** Require subcontractors to add your organization as an additional insured on their insurance policy, on a **primary and noncontributory** basis, for all liability and expenses arising from their work, including completed operations. Being named an additional insured gives your company the same rights provided to your subcontractor by their insurance carrier. This includes damages paid and legal defense. Verification of additional named insured status should be secured.
- **Certificates of Insurance (insurance requirements)** – Is proof of a contractor's insurance coverage. Organizations should have a process to track receipt of current certificates of insurance. It's important contractors continue to maintain adequate and current insurance coverage. Coverage limits should equal your company's limits for General Liability, Motor Vehicle Liability, and Umbrella coverage limits. Also, verify current Workers' Compensation coverage.
- **Waiver of Subrogation** – States the subcontractor waives their right to sue or allow someone, such as their insurance carrier, to sue your company in the event of a loss arising from that subcontractor's work.

Consult with a legal advisor, licensed insurance agent, and your current commercial insurance carrier for acceptable limits.

Safety:

Many contracts include clauses for safety, including responsibility for the condition of the job site, parking lot, sidewalks, and manufactured products. The subcontractor is responsible for protecting their employees, your employees, and the general public. Failure to maintain a safe worksite in compliance with all federal, state, and local laws, codes, and regulations may lead to the removal of the subcontractor's employees from the job site. Failure to perform according to the terms of the contract may also lead to the removal or termination of the contract.

Claims Examples:

Here are two examples of actual claims that would have had much different outcomes if proper risk transfer techniques had been used. All names have been changed to protect the identities of the parties. Any likeness to any person or company is completely coincidental.

Example 1:

Great View Properties hired a snow-removal contractor, Pete's Plowing, to remove snow and ice removal at their Great View Shopping Center. The contract didn't contain an Additional Insured or Indemnification Clause in favor of Great View. An unusual amount of ice had accumulated on the shopping center sidewalk. When Sally Johnson slipped and fell, it caused a torn meniscus and ACL. Pete's Plowing had not completely cleared the area where Sally slipped. As a result of her injuries, Sally filed a claim totaling \$125,000 against Great View Properties' commercial general liability policy. Had Great View Properties required Pete's Plowing to list Great View Properties as an Additional Insured on Pete's commercial liability policy, and had the contract included an Indemnification Clause in favor of Great View Properties, Great View's insurance carrier would have demanded that insurance provider for Pete's Plowing pay all attorney fees and damages.

Example 2:

Bob's Backhoe, an excavation contractor, was hired by ABC Contracting, a general contractor, to perform utility installation work. Bob's hired a subcontractor, Don's Dirtworks, to complete the trenching work. There was a contract in place, but it didn't require Don's Dirtworks to add Bob Backhoe as an Additional Insured to its policy. Two employees of Don's Dirtworks were working in a trench that was 12 feet deep and not shored when the trench collapsed, killing one employee and severely injuring the other. The case went to trial, and the jury returned a guilty verdict, sighting \$9 million in compensation due to the families. Bob's insurance carrier paid most of the claim and \$448,000 in legal fees needed to defend the case. If Bob's Backhoe had required Don's Dirtworks to list Bob's as an Additional Insured on its policy, the insurance company representing Don's would have likely been responsible for the entire claim, including legal expenses.

Resources:

Contact your local West Bend Loss Control associate for assistance or additional resources.

Information in this document should not be considered or relied upon as legal advice. We urge you to consult your own legal counsel concerning your specific operations and exposures and to review contracts and contract language. Additionally, consult your licensed insurance agent or risk manager to determine appropriate insurance limits.