

Risk Transfer Suggested Practices For Commercial Property Owners

Common practices, such as leasing space to tenants, contracting 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 as a property owner 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 a 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. Recordkeeping

I. Certificates of Insurance

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

You can require 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 fake 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, you may discover later that a contractor, tenant, or vendor:

- has *no* insurance at all.
- does not have the right *type* of insurance.
- does not have *enough* insurance.

to satisfy your particular circumstances.

As a result, you or your insurance may have to pay for all or part of losses arising from a contractor's, tenant's, or vendor's actions, from which you might otherwise have been shielded.

2. Review Certificates of Insurance

Review Certificates of Insurance from contractors, lessees, and vendors 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 it becomes a routine function performed by administrative personnel. A checklist can be 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. Continue to follow up until a current certificate meeting all requirements is received. The certificates should be maintained in the subcontractor's or service provider's file 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 a contractor to start work or a tenant to take possession until satisfactory evidence of compliance is received.
- Withholding payment to a vendor until satisfactory evidence of compliance is received.
- Terminating the contract or lease 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. Consult your retained insurance advisor and legal counsel when determining adequacy of insurance requirements.

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, agreement, lease, or purchase order is executed containing insurance requirements and enforcement provisions, 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.

A procedure should also be developed for reordering Certificates of Insurance prior to the policy expiration date. A form letter should be created and sent to the other party at least 60 days prior

to the expiration date. This procedure will help ensure all subcontractors or tenants are financially capable of handling any losses that may result from their negligence throughout the course of the project or lease.

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 Contractors and Service Providers

Securing signed, written contracts from your contractors, tenants, and vendors before work begins or a lease commences can prove very beneficial to enforcing the terms of your agreements. Oral contracts, handshakes or "gentlemen's agreements" can be difficult to enforce. In many cases, participants to unwritten agreements may have different recollections of the facts.

A written contract can define the parties' responsibilities in regard to Certificates of Insurance, limits of liability, **additional** insured status, hold harmless agreements, employees, tools and materials, safety, and other aspects of the business relationship.

These two sources provide standard contractor agreements:

Associated General Contractors of America

AGC Document #600
1957 East Street, NW
Washington, DC 20006
1-703-548-3118
<http://www.agc.org/>

American Institute of Architects

AIA Document #201-1976 and 1977
1735 New York Ave., NW
Washington, DC 20006
1-800-365-2724
<http://www.aiaonline.com/>

which, with the help of legal counsel, can be tailored to your specific situation.

2, Review all documentation submitted for correctness before work proceeds or commencement of the lease.

Designate a person(s) within your organization who has been trained with the responsibility of receiving and reviewing the Certificates of Insurance and signed contracts, leases or purchase orders. Make sure these individuals review and approve all contracts, leases, Certificates of Insurance, and indemnification/hold harmless agreements **before any work begins or the lease commences**. All too often, Certificates of Insurance, leases and contracts are received, and not reviewed until after an incident occurs.

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.

Evaluate the risk you are taking 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 the written contract and the related insurance policies.

Why is "Additional Insured" Status important?

It can help by:

- providing coverage even if a court invalidates your indemnification/hold harmless agreement
- giving you certain rights under your lessee's or contractor's insurance policy, particularly with defense coverage
- discouraging your lessee's or contractor's insurance company from subrogating against you when a loss is caused by your acts or omissions.

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 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, agreements, leases, contracts, endorsements and Certificates of Insurance for at least 10 years or in accordance with all applicable statutes of limitations in your state. Consult your legal counsel for information and advice concerning statutes of limitations applicable to you.

