

Risk Transfer Mechanics for Contractors



Many firms frequently contract with other firms to provide services or perform some type of construction work. Examples range from contracting of janitorial services to installation of plumbing or better yet, complex construction of roads, bridges and buildings.

During the course of these operations, accidents may arise that cause bodily injury and/or property damage to the contracting firms, their employees, contracted workers, or the public. Ideally, the liability for any accidents should be transferred to the party who has the most control over the exposures that could cause a loss. Owners usually try to transfer liabilities to general contractors. General contractors try to transfer liabilities to subcontractors. Subcontractors try to transfer them to sub-subcontractors, and so on.

Everyone knows that selecting a qualified contractor is the key to maintaining a safe job site, but accidents can happen. And in the event of such a mishap, risk transfer mechanisms can prove invaluable by reducing your chances of unknowingly taking on someone else's liability or being exposed to additional risks due to the actions or in-actions of others. These mechanisms can also allow a firm to shift its liability to another party.

This bulletin discusses the following risk transfer mechanisms:

- Certificates of Insurance
- Hold Harmless Agreements
- Additional Insured Endorsements
- Owner's and Contractor's Protective Policies (OCP)
- Waivers of Subrogation

Since individual state laws and circumstances vary, it is important that you contact your legal counsel to discuss how these risk transfer mechanisms will apply to you in specific situations.

Certificates of Insurance

Contracts can include provisions that require subcontractors to obtain and maintain various types of insurance coverage, including Workers' Compensation, General Liability, Automobile Liability and others.

A certificate of insurance is a form issued by the subcontractor's insurer (or its agent) which lists the coverage(s), expiration date(s), and limits of the subcontractor's coverage(s). The certificate may also describe special endorsements that have been added to the policy e.g., additional insured endorsements, waiver of subrogation endorsements, special notice of cancellation endorsements, etc. Certificates of insurance do not alter the terms or conditions of the policies described. The policies' actual terms are the ones that will apply.

Prior to the commencement of the subcontractor's work, you can require proof of insurance via certificates of insurance from all subcontractors. Requesting a certificate of insurance does not, in itself, transfer any risk, but does indicate the other party's types and limits of coverage. You should consult your insurance advisor and legal counsel to determine, based on your specific circumstances, what insurance requirements are appropriate for the parties with which you contract.

After reviewing the certificates, you should file them chronologically according to the soonest expiration date shown on the certificate. Then, you can request a renewal certificate before the old coverage expires. You can also require subcontractors to give 30 days notice prior to cancellation, non-renewal or material change of coverage.

Hold Harmless Agreements

Hold Harmless Agreements (sometimes referred to as indemnity agreements) are used to transfer risk of loss, damage, or liability from one party to another. They are often incorporated into construction contracts, service job contracts, purchase order agreements, lease agreements, and consulting agreements.

Depending on the way that they are drafted, interpreted, and enforced, there can be great variety in the extent to which indemnity agreements transfer risk (i.e. wholly or proportionally, or not at all), what actions or inactions will trigger a transfer (i.e. your own or another party's negligent or intentional acts or omissions, or both), and the types of risk that are transferred (i.e. bodily injury, prop-

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erty damage, defense of claims, damages, etc.). As a result, it is important to consult your legal counsel whenever you contemplate entering into an indemnification agreement.

Additional Insured Endorsements

There are many ways that owners and contractors can end up in litigation arising out of the acts or omissions of subcontractors. Therefore, owners and general contractors should consider requiring subcontractors to name them as an "additional insured on a primary, non-contributory basis" on the other party's primary commercial general liability (CGL), or any other appropriate, policy. This information should be listed as such in the comments section on the certificate of insurance.

Insurance policies can be endorsed to add companies that do business with a named insured (policyholder). A company that is added to a policyholder's insurance policy is considered an additional insured. The endorsement that adds the company is known as an additional insured endorsement. This endorsement can complement an existing construction contract and can help protect a party from liability arising out of another party's negligence. In this way, the party named as an additional insured does not have to rely solely on the validity, effectiveness, and enforcement of the hold harmless agreement for protection. Additional insured endorsements can cover the additional insured for accidents that arise out of the named insured's involvement with a job.

Additional insureds are only covered for operations that involve the named insured (policyholder) in some way. In this respect, additional insureds receive narrower coverage than named insureds, since named insureds are automatically covered for any business activity that isn't specifically excluded by the policy. Policy exclusions apply equally to named insureds and additional insureds unless specifically noted otherwise in a CGL policy or on the additional insured endorsement.

You should consult your insurance advisor and legal counsel regarding the effect of any additional insured endorsements which apply to you.

Owner's and Contractor's Protective Policies (OCP)

OCP policies protect the interests of someone hiring a contractor. They are purchased by the hired contractor,

but actually insure the party hiring the contractor. OCP policies show the hiring entity as the policy's named insured. General Contractors may be required to buy these policies for owners. Subcontractors may be required to buy these policies for general contractors. The hiring party is generally covered for liability arising out of acts or omissions of the contractor. In addition, the hiring party is generally covered for its general supervision of the contractor.

The coverage provided by OCP policies can be broader or narrower than some additional insured endorsements.

Even if OCP coverage is narrower, OCP policies have two advantages that might make them attractive over additional insured endorsements:

- OCP policies have a separate limit of liability that doesn't have to be shared with the purchasing contractor. Additional insureds have to share policy limits with the named insured.
- OCP policies are written in the name of the hiring entity, so the hiring entity will be notified if the coverage is cancelled. Additional insureds often aren't notified when the policy covering them is canceled.

Waivers of Subrogation

Owners and general contractors often include waivers of subrogation in construction job contracts. The waiver gives up a contractor's right to sue the owner or general contractor in defined circumstances.

If a contractor waives its right to sue, it also affects the contractor's insurer, which might have prohibited such a waiver in the insurance policy. The insurer would have used that right to seek recovery from the responsible party for insurance claims paid to or for the contractor. Usually insurers have no independent right of their own to sue responsible parties for reimbursement of claims the insurers have paid to or for their policyholders. Insurers have to "subrogate" (take over) their policyholders' rights against wrongdoers. The process of using an insured's rights to sue a responsible party is called "subrogation."

To avoid litigation expenses down the road, beneficiaries of waivers sometimes require that the waiver-giver endorse its policy with a Waiver of Subrogation endorsement. Such endorsements verify that the waiver-giver's insurer is aware of the waiver, and won't initiate subrogation actions that, while deemed waived, are expensive to

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- If you name someone or request someone name you as an "additional insured" on a liability policy, determine which coverage is primary or excess. Consult your insurance agent and legal counsel for help on this issue.
- Get a signed agreement. "Gentlemen's Agreements" or handshakes are difficult, if not impossible, to enforce. In many cases, participants to unwritten agreements may have different recollections of the facts.
- KEEP RECORDS. No matter what strategy you develop in regard to risk transfer, it is vitally important that you keep records. Documentation of contracts and agreements will be crucial to your case in the event of a lawsuit.

If you are to be an indemnitor:

- Evaluate the risk you are taking on in light of the value of the contract as a whole. Can you do business with the other party without signing this agreement? Can you negotiate with the other party for more favorable terms? Did you make your bid conditional based on any specific contract terms? Is the business you receive worth the potential liability you may assume?
- Get familiar with the operations of businesses you are planning to protect, and find out what controls they have in place to prevent accidents. You need to be aware of the potential risks that may arise from their operations.
- Be clear as to your intent. Do you intend to assume liability for the sole negligence of the other party, or only for their liability as it results from your own negligent acts or omissions? Are you seeking indemnity for your own negligence, or only concurrent negligence, from liability arising out of the negligent actions of subcontractors or vendors? Are you assuming liability for the willful and wanton acts of other parties? Consult your legal counsel.
- Once you've decided that you're willing to take the risk, an important question you need to answer is: Do you have insurance coverage for the liability you've assumed? Check with your insurance agent.

If you are to be the indemnitee:

- Consider having the agreement require that defense costs be paid up front on your behalf. Otherwise, you could find yourself paying out defense dollars, with no guarantee that you'll be reimbursed once the case is adjudicated
- Verify that the indemnitor is insured and that the insurance is in force.

Contact your CNA Risk Control Representative for further assistance with your safety and risk control program.

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Save Time and Increase Productivity by Monitoring Road Construction



Imagine if all of your managers, supervisors, staff, employees and delivery personnel could save 30 minutes a day in their travel time. That would be equal to 10 hours a month or 120 hours a year, per employee. Would a simple system that could save that much of your valuable production time interest you (and your company's bottom line)?

Every business has deadlines, work contract limits, mandatory delivery times, etc., that effect efficiency, company effectiveness, customer relations and ultimately, company profitability. Every year, businesses spend hundreds of thousands of dollars on time studies, attempting to find better ways to make more efficient use of the employees' work day.

Most businesses have employees who travel, for one reason or another. They travel to visit customers on sales calls, they make deliveries, they travel to and from job sites, they transport cargo between major cities and yes, they even sell and service insurance. Wouldn't it be nice if these employees and staff had more time to do what they do best and with less aggravation? Here's a tip that can save you as much as three weeks of time per traveling employee every year.

By regularly checking your state's Department of Transportation (DOT) Web site, you can find out beforehand where all those aggravating road construction delays are or where major accidents have occurred. To access this free information online, follow these simple instructions:

1. Start at the Federal DOT Web site, <http://www.dot.gov>.
2. Find the heading on DOT's homepage titled "Individuals and Businesses".
3. Under that heading, find the link entitled "Find Information on a Local Issue (find your State Transportation Department)" and click on it.
4. You now have a listing of all of the states and their respective DOT links. Click on your state's link.

5. You will now get a base page with the state Web site you chose. Click on the state's link.
6. When you get to your states DOT site, find the section on the page dealing with "Interstate Construction and Accidents", "Construction Project Information" or "Traveler Information". Click on the appropriate link.
7. On most states' DOT Web sites, you will be shown a map of the state with every major highway where construction is occurring or major accidents have occurred. Just click on the applicable route and get the information you need.

From there, it's simple to plan your route in order to avoid the traffic problems and save your employees the aggravation of waiting in stalled traffic.

In addition to the time that can be saved, there is yet another benefit to regularly monitoring road conditions and reduced vehicle accidents. Because your drivers can avoid the traffic and hazards associated with road construction, the potential for "rear-end" and "sideswipe" types of vehicle accidents is reduced. Fewer vehicle accidents mean fewer employee injuries, which translates to savings on Workers' Compensation costs. Make it easy on your traveling personnel. Get them to their destinations in the quickest and safest manner and reap immediate and long term benefits, including:

- Reduced potential for vehicle accidents.
- Reduced potential for "road rage" incidents.
- More time for the employee to do the job.
- Increased productivity and profits.

Want more information on how CNA Risk Control can assist in improving your "bottom line"? Call your insurance agent or your local CNA office for more information.

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Safety In & Out of the Manhole



Manholes can be dangerous places. The hazards associated with entering and exiting a manhole are capable of causing bodily injury, illness and death to a worker. Innocent looking manholes may contain:

- Oxygen deficient atmospheres.
- Hazardous gases:
 - Methane and hydrogen sulfide gas, H₂S, – naturally occurring gases formed by the decay of debris like weeds, leaves, and grass.
- Other hazardous materials generated from intentional and unintended acts, spills and leaks, of surface and underground sources.

Fatal Flaws

- After a pump was installed, an apprentice plumber entered a manhole to open a valve and was overcome by hydrogen sulfide. Four other contractors entered the manhole to attempt a rescue and were all overcome. The fire department, equipped with Self-Contained Breathing Apparatus (SCBA) entered the manhole and completed the rescue. The result was one worker died and the others were hospitalized. The workers had been overcome by hydrogen sulfide.



- A maintenance man entered a manhole without informing his co-worker or foreman. When his co-worker and foreman found him, he had been overcome by H₂S. Three other workers completed the rescue, and the foreman and co-worker recovered. However, the maintenance man, who had entered the manhole to do routine work, died. The H₂S levels in the manhole were found to exceed OSHA's allowable limit.

Confined spaces historically considered to be safe can develop deadly atmospheres without warning!

- Two men, standing above a manhole, were killed from septic sewer material that had been disturbed or aerated releasing a "cloud" of H₂S gas. OSHA regulations require testing and monitoring **in** confined space. OSHA does not address the exposure **outside** the manhole.
- During a sewer repair project, natural gas leaked into a manhole causing an explosion. The ignition source was found to be the battery connection of a laser being used in the manhole.

Batteries and other electrical connections need to be kept outside and away from manholes.

Controls

Confined space entry mistakes can kill. You should be aware of and follow OSHA standards and requirements.

Some of these requirements include:

- Training for entry personnel with annual updates.
- Training for standby personnel with annual updates.
- Training and equipping rescuers with SCBA.
- First aid and CPR training for rescuers.

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- Selection and training of a qualified person to authorize all worker entries.
- Continual atmosphere testing as long as workers are in the confined space.
- Ensuring hoist, harness and retrieval lines are attached to workers and ready for rescue.
- Mandating personnel, not immediately needed, be kept away from the manhole.
- Erecting barricades to control vehicular and pedestrian traffic.
- If the company is depending on other rescuers, those rescuers should be notified of the potential hazards present, and advised of services that might be needed.

References

- CNA Risk Control Bulletin, "A Guide to Safety in Confined Spaces"
- OSHA 29 CFR 1910.146(c)(2)
- Ontario Ministry of Labor
- *Complete Confined Spaces Handbook* by John F. Rekus.

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Sample Fleet Safety Program



Suggested Model Program for Our Customers

Driver Selection

Pre-Hire Requirements

All applicants for employment (“Applicants”) are required to complete a written application that will include listing references and previous employers. Applicants also are required to pass a pre-hire drug test. Anything less than a clean report is not acceptable by

(Your Company Name) _____

Applicants are required to sign a consent form and his or her Motor Vehicle Record (MVR) will be pulled before he or she is hired. MVRs will be kept in the applicant’s/ employee’s file. Each applicant’s driving record is required to meet the following criteria:

- a. Any applicant with a Type A driving violation in the last five years is unacceptable.
- b. Any applicant with three or more Type B driving violations or two or more at-fault accidents in a three-year period are unacceptable.
- c. Any applicant with two moving Type B driving violations or one driving accident in a three-year period will be put on warning from a company monitoring standpoint. MVRs are required to be ordered more frequently on these applicants, if hired.

Type A Violations

- Driving under influence of alcohol or drugs
- Refusing to take a substance test
- Driving with an open container (alcohol)
- Reckless driving or careless driving
- Hit and run
- Fleeing or evading police or roadblock
- Racing/speed contest
- Driving on suspended or revoked license
- Vehicular assault

Type B Violations

- Moving violations that include:
 - Speeding
 - Improper lane change
 - Failure to yield
 - Failure to obey traffic signal or sign
- Accidents
- Having a license suspended in past related to moving violations

A new driver may be required to complete a road test with a company experienced driver. The experienced driver will evaluate the new driver’s performance and document the road test. These tests will be kept in the new driver’s employee file.

Post-Hire Requirements

During an employee’s trial period, he or she will ride with a current company experienced driver, who will observe acceptable driving behaviors, routes, and loading/unloading procedures of the new employee (the “new driver”).

Motor Vehicle Record Checks

Annual record evaluations will be performed on every driver including the following:

- company truck drivers
- company car drivers
- salespeople or anyone driving their personal car for company business
- spouses with access to company vehicles
- anyone who may be required to drive a company car or personal car for company business MVRs will be reviewed in accordance with the aforementioned criteria.

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Non-Owned Vehicle Requirements

Employees driving personal cars for company business must meet the following requirements:

- MVR checked pre-hire and annually
- Classify the employee's personal policies as 'Business Use' policies
- Name (Your Company Name) _____ as an 'Additional Insured' on personal auto insurance policy
- Have minimum limits of \$300,000
- Provide Certificates of Insurance to management on an annual basis

Personal Use of Company Vehicle Policy

Company vehicles taken home at night or used for non-business activities must be given extra consideration when defining the personal use restrictions. A personal use policy will include, at a minimum, the following sections:

- Driver eligibility requirements (authorized driver, appropriate age, acceptable MVR, etc.)
- Management approval of personal use
- Requirement to follow company substance abuse policy and accident reporting policy
- Restricted use of company vehicles no (towing, overloading, giving rides to hitchhikers, for loan or hire to others, travel to other countries, attaching equipment, etc.)
- Accountability for not adhering to (Your Company's Name) _____ personal use policy

Transportation Safety Rules

(Your Company Name) _____ requires all drivers comply with state and national transportation safety rules. In addition, all employees are required to adhere to the following rules as set by management while driving:

- Mandatory seatbelt use
- Appropriate in-vehicle behaviors
- Absolutely *no* alcohol or controlled substances allowed
- Always look out for pedestrians
- Never attempt to exercise the right-of-way
- Emergency cell phone use only
- Include additional rules

Maintenance Inspections

All drivers of regulated vehicles (greater than 10,000 lbs. GVW) are required to complete a documented pre/post-trip maintenance inspection that will be filed. All drivers of personal passenger vehicles or non-regulated vehicles are required to submit their vehicles for a maintenance inspection at least quarterly. These maintenance inspections will be filed.

Accident Reporting and Investigation

Every accident is required to be reported, investigated and reviewed.

- Each vehicle should be equipped with a Vehicle Accident Report Kit. The kit should include an accident report, disposable camera, and emergency contact numbers. Drivers are required to submit the written accident report to management immediately following their involvement in a vehicle accident.
- A police report should be obtained.

The primary purpose of investigating an accident is to find out its cause and initiate action to eliminate or control similar vehicle accidents. Another purpose is to determine whether the accident is preventable. A preventable accident is one in which the driver fails to exercise reasonable precautions to prevent the accident from occurring. Each driver's supervisor is required to investigate all vehicle accidents.

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Commercial Drivers License (CDL) Required Vehicles

Driver Qualification Files following the Federal Motor Carrier Regulations will be maintained on all drivers with their CDL. A file will be maintained on each driver operating a vehicle in excess of 26,000 pounds. GVW engaged in interstate commerce and/or drivers of vehicles in intrastate commerce if the registered gross weight of the vehicle or combination of vehicles exceeds 26,000 pounds.

(Your Company Name)_____ will maintain records for the following requirements:

- Application Form (FMCSR Part 391.21)
- Inquiry To Previous Employers – 3 years (FMCSR Part 391.23)
- Motor Vehicle Records (MVR) Check - 3 years (FMCSR Part 391.23)
- Motor Vehicle Records (MVR) annually (FMCSA Part 391.25)
- Annual Driver's Certificate of Violations (FMCSR Part 391.27)
- Annual Review of Driving Record (FMCSR Part 391.25)
- Driver's Road Test and Certificate or Equivalent (FMCSR Part 391.31) (FMCSR Part 391.33)
- Medical Examiner's Certificate (FMCSR Part 391.43)
- Alcohol and Controlled Substances Testing Information and Results (FMCSR Part 382 & Part 40)

Depending on the type of commercial vehicle and its intended use, additional requirements may be necessary.

Information is also available at the FMCSA web site:

<http://www.fmcsa.dot.gov/>

Non-Commercial Drivers License (CDL) Required Vehicles

DOT states that drivers of vehicles 10,001 pounds. GVW to 26,000 pounds. GVW do not need a Commercial Drivers License (CDL) or to be in a substance testing program. However, DOT requires the employer maintain the following file for each driver of the vehicle:

- Application Form (FMCSR Part 391.21)
- Inquiry To Previous Employers – 3 years (FMCSR Part 391.23)
- Motor Vehicle Records (MVR) Check - 3 years (FMCSR Part 391.23)
- Motor Vehicle Records (MVR) annually (FMCSA Part 391.25)
- Annual Driver's Certificate of Violations (FMCSR Part 391.27)
- Annual Review of Driving Record (FMCSR Part 391.25)
- Driver's Road Test and Certificate or Equivalent (FMCSR Part 391.31) (FMCSR Part 391.33)
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This policy is mandated and supported by the management of:

Company Name

President/CEO/Management Signature

Date

Sample Acknowledgement Form

To be kept in employee personnel file.

I have read and understand my obligations as listed above concerning the possession and use of a company vehicle. Further, I understand that failure to abide by this agreement shall result in suspension/revocation of my company vehicle privileges and/or disciplinary action.

Employee Signature

Date

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