



RISK TRANSFER STRATEGIES

Contractors, subcontractors, and vendors (a "Third Party") all play a critical role in the day-to-day operation of sports and entertainment venues. From the onset, contractors and subcontractors were used to build your venue, and play a major role with the ongoing repairs and maintenance to the building. Vendors are often used to clean the facility, provide food and beverage services, and provide security services, which can range from having trained security personnel on-site, to equipping the facility with the latest security technology products. Maintaining strong relationships with Third Parties is not just desirable, for most sports and entertainment venues it is mission critical to their long term success. However, venue operators must learn to balance the desire to maintain good relations with their Third Parties with protecting themselves from losses that they may not be responsible for.

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Anytime a Third Party performs work at another person's property, there are risks involved. Property can get damaged and people can get injured. Without the proper risk transfer strategies in place, your organization could be held liable for the damages. In the above scenario, if the venue operator did not ensure that the proper risk transfer techniques were in place, there is a strong possibility that they could be responsible to pay for the defense and potential settlement/judgment resulting from the claim/litigation. It is important to realize that when an insurance company pays for losses (excess of the deductible that will be absorbed), even those losses that technically were not the fault of the insured, future premium may be impacted.

There are ways to protect your organization from scenarios like the one above. The most common layers of protection include the following:

- Indemnification Provisions in Contracts
- Additional Insured Status
- Certificates of Insurance

INDEMNIFICATION PROVISIONS IN CONTRACTS

The first and most comprehensive method to protect your venue from losses resulting from someone else's negligence is by ensuring that the indemnification, defense and hold harmless provisions within a contract are favorable to your organization. Indemnity, defense and hold harmless provisions are typically the focal point during contract negotiations and are often litigated when a lawsuit arises. Indemnification provisions can be very complex, and how they are worded in a contract can make the difference between your organization being responsible for paying for a loss (including defense costs) or being adequately reimbursed or completely absolved from a loss.

Indemnity provisions in a contract obligate one party (indemnitor) to provide defense and/or compensation/reimbursement for a loss suffered by the other party (indemnitee), while hold harmless agreements absolve another party from any responsibility for losses or liabilities. Some suggest that the terms "indemnify" and "hold harmless" essentially mean the same thing, while others believe that indemnity is a narrower term than that of hold harmless. Most of the time, both terms are incorporated in a contract. In reality, the term "indemnify" is given its broader meaning if a party is indemnified for both *losses* and *liabilities*.

To maximize your venue's protection, it is always a good idea to obtain an indemnification, defense and hold harmless agreement with your Third Party, as well as a waiver of subrogation (a contractual provision where one party agrees to waive its rights, and the rights of its own

insurer, to subrogate against another party in the event of a loss). These agreements are legally binding contracts that can protect your organization from losses arising from their actions or in-actions. These agreements can even be negotiated to cover situations where your organization is solely negligent. However, the reverse situation (where your organization is held responsible for losses from another's negligence) can also be included in a contract. This is why it is critical to have a system in place where all contracts are reviewed by either legal counsel or the proper insurance representatives (American Specialty or local broker). If you are paying for goods and services, why wouldn't you insist that, at a minimum, any harm resulting from those goods and services be the responsibility of the company that provides them.

ADDITIONAL INSURED STATUS

The second layer of protection from assuming liability for losses from someone else's negligence is having the Third party list your company as an additional insured on their insurance policy. Additional insured status provides more protection than simply obtaining a certificate of insurance (i.e. being a certificate holder). As an additional insured, your company would have the benefit of being insured under the Third Party's insurance policy. Additional insured coverage is typically provided by an endorsement, or an amendment to the Third Party's insurance policy and requires that your organization have a business relationship with them. The scope of additional insured coverage will likely depend on the language of the additional insured endorsement. Some insurance policies only provide additional insured coverage "where required by written contract or agreement", so it is important that your contract with the Third Party include this requirement. The main benefit of additional insured status, which should be requested in conjunction with primary and non-contributory endorsement language that requires all of their policies to respond before yours to avoid horizontal exhaustion, is that it provides protection under the other party's insurance policy for liability that may occur as a result of their negligence. By requiring your Third Party to name your company as an additional insured, you are making their insurance coverage the primary respondent to any claim that may arise from their work, service, or product. Additional insured status ensures that the duty to provide defense and the cost of a settlement is with the contractor's insurance company first before your insurance is affected. Payment for a claim would continue until the costs exceeds the limits of the additional insured's policy

The following are other benefits to obtaining additional insured status:

- Insurance coverage may still be provided even if a court invalidates your company's hold-harmless agreement.
- As an additional insured, your company should have direct access to the Third Party's policy for both defense and settlement/judgment (defense costs are outside the limits of the policy).

- Reduces the likelihood that the other party's insurance company will seek reimbursement (subrogate) from your company for any claim caused by your negligence.
- Avoids having a claim paid on your insurance policy, which will make for a more favorable loss history and keeps your premium rates low.

CERTIFICATE OF INSURANCE

The third layer of protection from assuming liability for losses resulting from someone else's negligence is obtaining a certificate of insurance from any party that performs work at your venue or on your behalf. A certificate of insurance is defined as a document that is executed by an insurer or agent and issued to a third party as a statement or summary of insurance coverage. Certificates of insurance include important information such as, the name of the insured, coverage types, liability limits, and the policies' effective periods. Certificates of insurance are often misunderstood as contracts. A certificate of insurance is simply a snapshot of the insurance coverages in place. Requesting a certificate of insurance does not transfer any risk. What it does, however, is provide evidence that the other party has or does not have the proper insurance coverage in place. This information is critical information for an owner or operator of a venue that is requesting services from a Third Party.

It is never a good practice to have a Third Party perform work for you without knowing if they have the proper insurance coverage and limits in place. If they are uninsured or under-insured, your company may wind up paying for any damages. Because of this, venues should always require Third Parties to provide certificates of insurance each time they are hired to do a new job. This should be done even if they are a trusted Third Party whom you have worked with for several years. Work to be performed at the venue should not commence until the certificate of insurance has been delivered, reviewed, and approved by the proper individual within the organization. To ensure that the certificate does not contain fraudulent information, it is best to request the insurance certificate from either the insurance company or the insurance agent instead of getting it through the Third party.

The following items should be closely reviewed when receiving a certificate of insurance:

- Confirm that the name of the insured on the form is the exact match for the company you are hiring.
- Confirm that the coverage dates are valid. If the contractor's insurance policy is set to expire before the job is completed, you will need to request an updated certificate of insurance.
- Confirm that all portions of the certificate have been completed, including signatures.
- Ensure that the certificate evidences what is required by contract or, at a minimum, both General Liability insurance and Workers' Compensation insurance. Depending on the type of work being performed, proof of other insurance such as Product Liability,

Commercial Automobile Liability, Umbrella Liability, Professional Liability and/or Cyber Liability Insurance may be required.

- Ensure that the liability limits are appropriate and match what is required by contract. Confirm that your organization is named as an additional insured on at least the General, Products, Automobile and Umbrella Liability Insurance policies (as applicable).

Note: American Specialty clients can manage certificates of insurance through the American Specialty Certificate Manager (ASCM). ASCM is an online system, which enables clients to request and retrieve Certificates of Insurance on a real-time basis and provides a certificate repository for future reference in the event of a claim. ASCM streamlines the work of clients who issue, collect, and manage large volumes of Certificates of Insurance.

CONCLUSION

While maintaining good relationships with business partners is important, it should not come at the expense of leaving your organization vulnerable to assuming liability from losses resulting from someone else's negligence. Ideally, liability should always rest with the party that has the most control over the situation. Often your organization has little control over what another party is doing when they are working inside your venue. Ensuring that the indemnification, defense and hold harmless provisions within a contract are favorable to your organization, having Third Parties list your company as an additional insured on their liability insurance policies, and obtaining a certificates of insurance from any party that performs work at your venue will go a long way to protect your organization from unknowingly taking on another entity's liability or being exposed to additional liabilities due to the actions of others.

If you or your staff have any questions concerning this important Safety Bulletin, please contact us today.



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