



COLBURN GROUP

I N S U R A N C E

NEWSLETTER

Welcome to Colburn Group's Newsletter!

It is with great satisfaction that we bring our newsletter to you. In this issue and in coming months, we will discuss pertinent risk management topics that we hope you will find interesting and informative. Please do not hesitate to contact us should you have any questions or suggestions for future issues.

For your information, our office provides a broad spectrum of insurance products including commercial insurance, personal insurance, life, disability and long term care.

We invite you to visit our websites: www.colburngroup.com and www.employerscompadvocate.com

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What You Should Know About Hold Harmless Clauses

Hold Harmless clauses in contracts are a way one party assures that the other party will pay for, or share the cost of, a loss. For the owner or general contractor, hold harmless clauses are a way to help keep insurance premiums lower by reducing risk exposure.

Hold harmless clauses tend to generate a good deal of concern and effort, as owners pressure the general contractor, who pressures subcontractors, who pressure their subs, each trying to get as much express indemnification as possible into contracts. Express indemnification secures or protects someone from legal responsibility for a loss—that is, holds him or her harmless. There are three types of express indemnity clauses typically found in construction industry contracts—including some that can be found in the fine print on purchase orders.

A Type One (also called “broad form”) indemnity clause states that the indemnitor, the party taking responsibility for potential risk or loss, will hold the indemnitee, the protected party, harmless from the risk in question, even if the entire loss is caused by the indemnitee. An example would be if a contractor agreed to hold a project owner harmless for any claims arising from the project, even if the claim was caused solely by the owner’s negligence.

More common is the Type Two (“intermediate form”) clause, which requires the indemnitor to assume all of the risks associated with the subject, but not if the sole cause of loss is attributable to the indemnitee. Typical intermediate form language could include the contractor agreeing to hold the owner harmless from any and all claims arising from the project, provided such claim is caused in whole or in part by the negligent act or omission of the contractor, regardless of whether the claim is caused in part by the negligent act or omission of the owner.

A Type Three (“comparative fault”) clause holds the indemnitor responsible only for the loss caused by the indemnitor, or to the extent caused by the indemnitor. Typically, the contractor would agree to hold an owner harmless from any and all claims arising from the project, but only to the extent the claim was caused in whole or in part by the negligent acts or omissions of the contractor.

Some states have passed laws limiting the types of clauses that are allowed in contracts. Supporters of these limitations argue that the highly competitive nature of the business forces contractors and subcontractors to assume all the liability of the project, no matter who is at fault in an accident, if they want to win the bid. If an accident happens, the contractor could be forced into bankruptcy.

The law of the state where the work is performed is usually the law that applies. For example, a Detroit automobile company wrote a construction contract containing a Type Two express indemnification clause for work to be done in Delaware. When a loss occurred and the company tried to hold the contractor to the clause, the Delaware court threw the clause out entirely. Michigan recognized Type Two clauses, but they weren’t allowed in Delaware.

Feelings about hold harmless clauses generally follow one’s position in a chain of relationships. For the owner or general contractor, hold harmless clauses are always desirable. It’s a different story with subcontractors, although they are often a condition of doing business. It may not make sense, however, to agree to a hold harmless clause with a general contractor who has the reputation of operating unsafely or with outrageous demands, such as holding the architect harmless even in the event of a loss that was solely due to the architect’s error.

Employee or Independent Contractor?

A common scenario many business owners face is hiring an independent contractor, who operates as a sole proprietor, for a task where the possibility for injury exists. Yet, you fail to obtain workers' compensation coverage for this person because you assume if they were injured on the job, their independent contractor status would prohibit a claim against your insurance.

What you may not realize, however, is that just because someone is a sole proprietor of a business doesn't automatically make them an independent contractor if they come to work for you. They may very well be considered an employee.

Determining whether someone is an employee or independent contractor is complicated by the fact that three separate agencies, your state Workers' Compensation Board, your state Department of Labor and the IRS, each make a determination of status based on their own criteria. The IRS requirements can be found online at www.irs.gov. You can obtain state requirements by contacting your state Workers' Compensation Board and Department of Labor office.

In spite of all of this seeming confusion, there are general rules of thumb you can utilize to determine if a worker should be considered an employee. The commonality among these criteria is that the employer directly controls the how, what, and when of the worker's employment.

Direct Evidence of the Right to Control

- Do you have the right to require compliance with your instructions?
- Will you be training this person through meetings, classes, or apprenticeship with a more experienced worker?
- Will the worker's services be integrated into your overall business operations?
- Do you set the number of hours this person will work?
- Will the worker devote full time hours to your business?
- Do you determine the order or sequence in which the worker's tasks are performed?
- Is the worker required to submit regular oral or written reports?
- Do you pay the worker's business expenses?

Method of Payment

- Do you provide this person with hourly, weekly, daily, monthly or other regular periodic payments?

Furnishing of Equipment

- Is the work being performed on your premises?
- Do you provide the worker with tools, materials, or other equipment?

Right to Terminate Relationship Without Liability

- Do you have an ongoing relationship with the worker?
- Do you have the right to discharge the worker without liability?

The general criteria for determining whether a worker should be considered an independent contractor or employee are as follows:

- Does the worker perform services for several unrelated persons or firms at the same time?
- Does the worker make the services available to the general public on a regular and consistent basis?
- Does the worker realize profit or suffer a loss as a result of his/her services beyond the profit or loss ordinarily realized by employees?
- Does the worker invest in facilities used in performing services that are not typically maintained by employees?
- Will the sale of business assets provide the worker with a gain or recovery?
- If the worker suddenly stops working, is there contractual liability?



Remember, a worker's status is subject to the particulars of the specific work to be performed. While someone may qualify as an independent contractor for one assignment, they may become an employee for the next job. Therefore, you must always re-evaluate the worker's status on a regular basis to ensure compliance.

Certificates of Insurance - A Prudent Means to Avoid Costly Claims

More and more companies are hiring independent contractors to handle not only administrative matters, such as benefits and human resources, but also sales, distribution or other types of work. With this delegation of authority to third-party suppliers comes less direct control over these operations, and greater becomes the need for clients to demand that vendors provide them with timely Certificates of Insurance (COI).

The COI proves that the insured (the third party) has purchased the insurance coverages as required by the outsourcing client. But, the COI also states that the holder of the certificate has no legal right to be covered by the insurance described in the COI, nor does it amend, extend or alter the represented coverage. The COI only shows that the outside contractor has the insurance coverage as explained on the certificate. This protects the business that has contracted with the third party against liability for negligence caused by the independent contractor up to the limits of the policy. In addition to requiring the certificate, whenever possible, the outsourcing client should ask to be included not just as the certificate holder but also as an additional insured.

It is the responsibility of the independent contractor to provide the COI to the client that has hired the firm. A COI is prepared by an agent/broker with a copy sent to the insurance company and the client for whom the third party has contracted to perform certain functions.

The COI contains the name of the insured, the name of the insurance companies issuing the policies as stated on the COI, what specific coverages are contained in the insur-



ance policies issued to the insured, and various descriptions of normal policy terms, exclusions and conditions.

Most often COIs are obtained for commercial general liability, auto liability and workers compensation. Commercial general liability provides protection from liability arising out of the insured's premises or operations, prod-

ucts and completed operations. Usually, a general form will provide broad, standardized coverage terms. In cases, where the coverage is more complex and of a higher risk, manuscript forms of a COI can be written specifically by or for an insurance company. These manuscript COIs should be reviewed carefully for the scope of coverage being provided.

There are two types of general liability forms -- claims-made and occurrence. The trigger that compels the policy to respond is the main difference between the two forms. In the occurrence policy, occurrences are considered if they take place during the policy period, no matter when a claim is reported. A claims-made policy requires that the occurrence takes place on or/after the policy retroactive date and that the claim be reported during the policy period. Most COIs use the occurrence form for all independent contractors as claims-made policies limit coverage.

But simply having a COI in hand does not always mean that the independent contractor has the insurance coverage. A prudent practice is to have a system to audit, review and have the certificates corrected to reflect the provisions in the contracts.

The consequences of not monitoring COIs of a third party can be costly for the firm that hired the contractor. Consider this sobering example. A business hired an independent contractor to provide distribution service for the company. An employee of the vendor had a serious car accident, and soon afterwards, the contractor ceased business. When the employee began submitting workers' compensation claims, there was no coverage -- the contractor had never maintained that insurance. Unfortunately, the company had not insisted on a COI from the independent contractor to verify this coverage. Casting about for payment of the claim, the court ruled that the vendor's employee was a statutory employee of the company that hired the contractor.

The workers' compensation claims have totaled more than \$100,000 with more to come.

This is just one of many sobering cases of companies having been caught with unexpected losses from not requiring proper COIs from independent contractors and auditing them to make sure they remain current and reflect the actual coverages held by the insured.



Where's the Insurance? Beware of Uninsured Drivers

About twenty years ago, a famous hamburger chain ran a series of commercials featuring an octogenarian named Clara Peller. This feisty little lady claimed her fifteen minutes of fame asking that now famous question, "Where's the beef?" While it may have been funny to watch her put fast food restaurant owners on the spot, it is not at all funny if you're in a car accident and you ask the other driver for their insurance card only to find out they have none.

Unfortunately that's a scenario that happens all too frequently. As the cost of living rises and paychecks don't meet needs, people start making decisions about where to cut expenses. One of those decisions may be to eliminate or greatly reduce the amount of their car insurance. They need the car and take the calculated risk that they won't get into an accident, but invariably, they are wrong. In fact, the possibility of an uninsured motorist hitting you is greater than you may realize. There are some states in which almost 32 percent of all drivers do not carry automobile insurance. The national average is 14 percent.

You can protect yourself from an uninsured driver, or even an underinsured driver, whose negligence causes you to be involved in an accident. The first way is with uninsured motorists (UM) coverage. It provides insurance protection for bodily injury caused by an uninsured driver. This type of policy permits you to collect from your own

insurance carrier just as if it provided liability coverage for the uninsured driver.

In a no-fault state, uninsured motorist coverage pays for damages when you or your passengers are injured in an accident caused by a driver without car insurance. Uninsured motorist coverage also pays for injuries that result from a hit-and-run accident. Policy owners choose the coverage limit when they buy their policy.

Underinsured motorists (UIM) coverage provides insurance protection for bodily injury damage, caused by a negligent motorist who is not sufficiently insured and whose negligence results in an accident. This coverage pays for your damages when you or your passengers are injured. It usually pays the difference between the coverage limit you select and the other driver's bodily injury coverage limit.

Both UM and UIM coverage are broad in scope because they provide benefits for you and your family members' injuries that occur in your own covered car, in cars you don't own, and as pedestrians. Despite all of this protection, the cost for this coverage is reasonable compared to liability coverage and physical damage coverage for your own car. Primary limits up to \$1,000,000 are available and can be extended to an umbrella policy.



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