MarshMcLennan Agency

Risk transfer guide

Your future is limitless.℠

We can assist you with developing a standard of requirements, policy type, levels of coverage limits, and any other specialty endorsements or coverage that may be applicable.

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Your future is limitless.

Ensuring the proper transfer of risk is a long-term business improvement solution.

Your organization may often rely on critical relationships with a vendor, contractor, tenant, or another third party. You may even be part of several contractual relationships at one time, and because of this, it's important to control the type and magnitude of the liabilities you assume and wish to transfer.

While contractual risk transfer can be complex, when properly implemented, it helps manage the risk inherent in your daily operations. Without it, your organization potentially faces an increase in liability exposures and claims, which negatively impact insurance programs and the financial strength of your organization. You may also see a reduction in carrier availability, a rise in premium costs, and penalties if third party certificates are not obtained. Additionally, you are responsible for managing your third-party risk and could jeopardize relationships with your clients if best practices for risk transfer techniques are not followed.

Our clients rely on MMA's risk transfer services to assist with identifying liability exposures and making positive business decisions.

While every industry is impacted differently, the basic fundamentals are the same. This guide will assist you in:

1. Recognizing concepts related to transferring risk and how it applies to your organization.
2. Identifying best practices with managing third party liability exposure and how our services can help.

Understanding Contractual Risk Transfer

Risk transfer is a strategy that involves the shifting of risk from one party to another through contractual requirements and clauses in the contract between the parties. When done effectively, the risk is transferred to the party who is in the better position to manage, control and minimize risk.

Or simply put, it transfers risk to suppliers, vendors or subcontractors so you are not automatically held responsible.

Risk transfer can be accomplished in many ways, but the most common include inserting clauses into your contracts to address:

- Insurance
- Contractual Indemnity
- Waivers of Limited Contribution

The goal of contractual risk transfer is to ensure if an accident takes place, the responsible party bears the financial responsibility for the loss. Contractual risk transfer can alleviate the responsibility to the non-offending party, which ultimately lessens the financial and insurance strains upon that party.

The Days of Handshake Agreements and Promises are Over

A component of any business relationship is securing a written contract which clearly lays out the responsibilities of each party. It is critical to identify each party's responsibility at the beginning of any relationship to lay the groundwork for expectations, the "scope of work," and to protect the parties from a loss. Contractual risk transfer can alleviate the responsibility to the non-offending party, which ultimately lessens the financial and insurance strains upon that party.

It is preferred that your organization utilizes a formal written agreement that outlines key provisions such as scope of work, finances, liability, insurance, waivers, warranties, etc. Alternative agreements such as purchase orders are not preferred as they contain very little information about the parties' intentions other than costs and a brief description of the work or product purchased. Purchase orders are void of any insurance requirements, leaving your organization exposed to losses caused by the other party that should have been transferred had you utilized a formal agreement.

Keep in mind that verbal agreements may not be binding and are difficult to prove. All agreements should be in writing and clearly outline the intent and responsibilities of the parties.

Contractual provisions to consider when negotiating

- The contract is the primary written memorialization that sets forth the intentions and obligations of the parties.
- Each party should understand the risk it is undertaking and how those risks can be transferred to another party.
- Each party should understand what losses may be covered by insurance and those that may not.
- Changes made to the contract after it is signed must be in writing.
- The contract serves as the basis for the tender of defense and indemnity as an additional insured.
- The contract should clearly set out the obligation of the parties with respect to insurance.
- The contract should be signed by the parties.
- The parties should be aware of clauses that limit liability and loss.
- A "one contract fits all approach" does not work for all situations.
- The standard contract you are using should be regularly reviewed, revised and updated.
- The contract should reference and incorporate all upstream contractual obligations, thereby binding the subcontractor to them.

Contractual Indemnity

Contractual indemnity is a clause in an agreement providing for one party (or both) to compensate for loss (indemnify) for one's conduct. This usually includes an obligation to indemnify the other party for attorneys' fees, costs, judgments, and other damages. Contractual indemnity should not be confused with insurance requirements. Contractual indemnity is a risk transfer provision that obligates one party to defend and indemnify the other for all losses, regardless of whether the loss is covered by insurance. All contracts should contain a contractual indemnity provision in addition to insurance requirements.

A typical indemnity clause may read as follows:

To the fullest extent permitted by law, subcontractor shall defend, indemnify, save and hold harmless, Contractor, Owner... from all claims, loss, damage, injury, causes of actions, fines, penalties, damages...

Contractual indemnity clauses can be broadly drafted to include any type of loss. Or, they can be narrowly written to include items such as losses arising out copyright issues, fines, and penalties for OSHA violations or breach of contract.

Indemnity clauses bind a party to compensate the other party for a loss regardless of whether it is covered by insurance.

State laws vary regarding the enforceability of an indemnification clause in a contract. Therefore it is important to review any contractual indemnity clause with your attorney and insurance broker.

Importance of Additional Insured

An excellent way to protect yourself from liabilities and exposures of your third parties is by requiring them to add you as an additional insured on their policies. Being an additional insured grants you certain rights under the policy. In short, the additional insured status protects your company from being exposed to unintended risk.

Additional items to consider when reviewing additional insured endorsement forms:

? **Is the form being provided applicable to your business operations?**
A form for contractors can differ from a form for vendors.

? **Is the form a Blanket form or Scheduled form?**
Blanket forms cover any additional insured as required in an agreement. Scheduled forms cover entities specifically listed in the schedule.

? **Does the form provide coverage for ongoing operations, completed operations or both?**
Not all forms have coverage for both.

? **Does the form limit coverage to the additional insured only if the direct contract is in place and to the extent permitted by law?**
Know the limitations or relevant state law and how it applies to additional insured coverage.

? **Does the form have a "no broader than required" clause?**
Pay careful attention to the additional insured requirements in a contract and that the scope of coverage intended to be given or received is clearly reflected.

? **Does the form have limitations on limits?**
Carefully consider the appropriate level of limits needed and how they will be reflected in the contract.

Certificates of Insurance

Certificates of insurance detail information about the insured's current coverage, including policy type, policy term, and limits of coverage. The certificate may also include information about special endorsements added to the policy, such as additional insured, waiver of subrogation, policy changes, cancellation or even coverage limitations.

When should a certificate of insurance be required?

You should require the third party to provide you its certificate of insurance before work or services are performed. This document will be proof of the coverage in place at the time the certificate was issued. By collecting and reviewing the certificate, you will be able to determine if the coverage provided meets the contractual obligation to pay for losses.

Specific insurance coverage requirements will vary based on the type of work or services being performed. For example, the exposure of a tenant leasing space varies greatly from exposure of a demolition contractor.

Important questions to ask when working with third parties:

- Does the third party you are hiring have adequate coverage to pay for losses and comply with the contractual obligations?
- Is the coverage appropriate for the work or services being performed?
- If coverage isn't being provided by the third party, who is responsible to pay for losses based on state laws?
- Will your insurance program be negatively impacted if the third party does not have adequate coverage?

The coverages outlined on a certificate of insurance:

1. Occur for a specific period of time.
2. Follow the policy, not change them.
3. Do not transfer any liability. The contract or special endorsements are where risk and liability is transferred.

Our review covers 83% more components than a typical self-managed review process.

Strategies for Effective Risk Transfer

There are many key areas to focus on for establishing an effective risk transfer programs.

- Work with your attorney to develop a third party contract.
- Determine appropriate levels of insurance coverage and limits specific to the work, services, or relationship with the third party.
- Require certificates of insurance and applicable endorsement forms.
- Secure a signed and written contract.
- Develop a system to collect signed contracts and review certificates of insurance.
- Enforce compliance with insurance requirements.
- Create a filing system to follow up on non-compliance and expiration.
- Ask for additional insured status and obtain copies of additional insured endorsement forms.
- Collect and retain contracts and certificates in accordance with applicable laws.

How Our Risk Transfer Services Can Help

Often, we see companies relying solely on their staff or in-house software. However, these processes may not always give you the results you need. Your staff may not have the time or expertise, and with that, may not review a certificate for full compliance. As a result, they may not identify when an endorsement form isn't providing the contractual coverage you are seeking. This leads to an increase in liability exposure that may not be identified until it's too late. Our risk transfer service team has sharp industry experts with years of experience and takes a proactive approach in reviewing your third-party exposure — all while saving your staff time and controlling administrative costs.

Our full-service risk transfer and insurance compliance program monitors insurance coverage of third parties to provide your organization with the necessary information to minimize your liability exposure.

We relieve your organization of the time consuming, labor intensive aspects of insurance compliance tracking.

Our team members possess over 100 years of knowledge and expertise gained from working with numerous organizations on insurance and risk transfer issues and can partner with you to help fine-tune your compliance approach.

Our program minimizes the chance of your organization assuming unintended risks and reduces exposure to litigation and financial loss while also controlling your insurance program costs.

This insurance coverage monitoring creates a uniform enforcement of standards throughout your organization which contributes to your organizations' compliance efforts.

We utilize an online program to centralize your document storage of:

- All certificates received
- Related notes and correspondence
- Managerial actions such as overrides

This program creates a consistent and automated certificate review and monitoring process. Your organization will have online access to your compliance data and customizable compliance reports. We will consult with your organization on all risk transfer challenges.

Our Risk Transfer Strategy

Here's an overview of our program:

Planning

- Develop specific insurance requirements in contracts, including indemnity provisions
- Set benchmarks for compliance goals
- Review current processes for improvement

Strategy

- Customized company-wide processes, procedures and reporting
- Thorough certificate of insurance review and endorsement form analysis
- Detailed documentation on exceptions

Our Process

- Our team will work with you to obtain the necessary information for implementation
- We assist in creating and training your staff on internal processes, procedures, and team integration
- Do not transfer any liability. The contract or any special endorsements is where risk and liability is transferred
- We obtain and analyze certificates and endorsements
- Our team monitors coverage for compliance (even after expiration) from the past to present

Results

- Awareness of liability and risk exposures
- Successful claim tenders
- Increased company-wide compliance

We support your organization with creating productive compliance efforts.

You have access to view your third-party compliance data at any time to make managerial decisions. We work in partnership with you to take on the compliance review and analysis, as well as the administrative burden associated with the processes.

At MMA, we focus on integrated risk management. Our risk transfer team works in conjunction with the claims team to identify claim trends and achieve properly tendered claims. Our efforts impact your financial results through increased third-party compliance.

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Contact your local MMA representative today to find out how our team can help you control your claim costs, meet compliance goals and achieve measurable results.

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