

Risk ADVISOR



A Contracts Checklist

The Fund provides a number of services that go far beyond what most insurance companies do for their clients. In addition to safety services, leadership training and member involvement in claim decisions, the Fund offers extensive review of contracts you are about to enter with your vendors, contractors and service providers. The contract review focuses on indemnification, safety provisions and insurance specifications that have a direct effect on the risk exposures to the member's clients, services, operations and people.

Contracts are one of the primary tools for transferring risk from one entity to another. The purchase of insurance is another. When the center pays its contributions to the Fund, the Fund provides coverage and money to pay for injuries or damages that the member would have to pay itself without the coverage. The numerous hail storms in Texas over the last two years are good examples. Hail damages a roof or dozens of vehicles. Since that is an insured peril under the center's coverage, the Fund pays for the repair of the damage which in some cases totaled in the hundreds of thousands of dollars. Without coverage the member would have to pay for the repairs. The risk posed by hail has effectively been transferred to the Fund. Contracts have a similar mechanism in the indemnification agreement. Also known as the hold harmless agreement, it shifts liability for damages or injury caused in the delivery of products or services to the contractor or vendor even when the loss occurs on member premises or the member could be considered partially at fault.

Some very strict hold harmless agreements shift all liability to the contractor by holding them responsible for even the "sole negligence" of the indemnitee (client or center for whom the contractor is doing work.) When the indemnitee has the money and the contractor needs the work badly a hold harmless agreement like this can be imposed. It is more common to find a mutual held harmless where each party is responsible for their own "sole negligence" but the contractor assumes responsibility for their own and partial liability on the center's part. Partial liability can simply be that the accident or injury occurred on the center's premises even though it was caused by the contractor's actions or operations.

In 2011 the Texas legislature outlawed the strict form of hold harmless in construction contracts because general contractors were using the agreements to push their own negligence off on their sub-contractors even though the sub-contractor had nothing to do with the incident. The prohibition applies to owners as well as contractors. The Fund can help you achieve as much protection for the center as the law allows despite this limitation on full risk transfer.

IN THIS ISSUE

A Contracts Checklist	1
Upcoming Events	2
Loss Control Briefs	4
Department of Labor Rule Delay	5

Upcoming Events

2017 Line-up of Liability Workshops for Texas Community Centers

★ **January 27, 2017: The Employment Law Refresher, the San Luis Resort Hotel in Galveston Texas.** The Fund's Employment Law specialists will bring you the latest developments, caveats and techniques for managing the employment processes of community centers. Focus for the workshop will be "what a new Executive Director needs to know about HR and Employment law."

★ **April 21, 2017: Purchasing Fundamentals and Risk Management, Hotel to be announced.** Statutory purchasing and performance contract purchasing requirements will be reviewed. Methods of procurement for real estate, goods and services, ethics and public information act requests arising out of purchasing activities will also be discussed. Cautionary tales and purchasing war stories will be shared.

★ **July 14, 2017: Confidentiality, Consents, Client's Rights and Disclosures, the The Crowne Plaza, Austin, Texas.** Confidentiality issues continue to be frequent and troubling issues for community centers. The important aspects of preventing confidentiality problems, dealing with disclosures, subpoenas, consents and client's rights will be presented.

★ **October 20, 2017: The Nuts and Bolts of Community Center Law, The Menger Hotel, San Antonio, Texas.** Confidentiality issues continue to be frequent and troubling issues for community centers. The important aspects of preventing confidentiality problems, dealing with disclosures, subpoenas, consents and client's rights will be presented.

Hotel Reservations, Hotels listed above will honor negotiated rates for rooms as long as reservations are made before their deadlines. Specific rates and deadline dates will be provided when the flyers for each workshop are issued. Workshops will begin at 8:00 a.m. and conclude by 3:30 p.m. Full breakfast and lunch will be served.

Continuing Education Credits

The Fund has continuing education sponsor agreements



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Questions, comments, tips, advice, ideas, opinions, criticism, and news are welcomed and encouraged. Every effort has been made to ensure the accuracy of the information published in *Risk Advisor*. Opinions on financial, fiscal, and legal matters are those of the editors and others. Professional counsel should be consulted before taking any action or decision based on this material.

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with the Texas State Board of Examiners of Social Workers, the Texas State Board of Examiners of Professional Counselors, the Texas State Board of Examiners of Marriage and Family Therapists and the Texas State Board of Public Accountancy. Continuing Education credits may also be applied for from the State Bar, Human Resources Certification Institute and the Texas Department of Insurance for specific workshops.

Registration is Easy, Register online at tcrmf.org for the workshops. There is a nominal \$75.00 fee for members and a \$350.00 fee for non-members.

Note: Hotel or HR Consortium registration does not register you for the Friday workshops. Contact Kathy Hulse at Kathy.hulse@yorkrsg.com or 512-427-2420 if you have questions or need help registering for the workshops.

Contracts Checklist continued from page 1

Checklist Item: Make sure that center contracts contain hold harmless agreements that shift as much risk to the service provider, vendor or contractor as possible. A mutual hold harmless where each party is responsible for their own sole negligence is a fair strategy to use to achieve risk transfer for shared responsibility.

Construction contracts may have a second hold harmless agreement in a contract section dealing with environmental impairment. This provision usually makes the owner responsible for any pollution or toxic substances that are on a construction site before work begins even if they are unknown at the time. After the construction work starts, the contractor assumes responsibility for any pollution or environmental impairment for which they are responsible. This is usually due to materials they bring onto the site or spills that occur during their operations.



Checklist Item: Mitigation of the environmental impairment risk is accomplished through careful survey and investigation of the site before construction starts including provisions for any

necessary remediation. RFP documents should describe any issues on the site. Selected contractors should carry environmental impairment liability insurance if there is potential for pollution or the site is environmentally sensitive.

Responsibility for construction site safety is also an item that should be transferred to a construction contractor. Contract provisions for safety should include assignment of a qualified safety officer who meets certain educational and experience requirements such as various OSHA certifications. Part of the contractor's safety program should require anyone who enters the jobsite to follow the safety rules and protocols in effect for the site. This should include wearing appropriate personal protective equipment such as hard hats, eye protection and reflective vests. This conformity to the contractor's safety requirements applies to all who enter the site including the owner's personnel. Another important requirement is security for the site. Security may be accomplished by fencing and gates and 24 hour site security people. This is important to reduce the risk of trespassers to a dangerous construction site especially after work has stopped for the day. Of most concern are children who are attracted to the site. Any vendors, contractors or service providers performing work on center premises should also be responsible for safety and adherence to center safety regulations.

Checklist Item: Effective safety programs and contract provisions help reduce or eliminate incidents and accidents that call into play hold harmless agreements and insurance policies.

Hold harmless agreements transfer risk between parties to a contract. A contractor assumes liability for whatever happens on a construction site, but how do they pay for any injuries, property damage or judgments against them from an accident? A few of the largest contractors or vendors may have sufficient financial resources to pay for damages but most rely on insurance. This is one of the important reasons for the insurance requirements in your contracts. General Liability insurance contains provisions that extend coverage to the parties held harmless in a contract as long as there is a written agreement in place, or a contract. The contractor's general liability insurance becomes the financing mechanism for the liability they assume through the contract with the center. The insurance company will pay up to the amount of coverage they provide the contractor. The general liability policy usually provides an amount per occurrence, often \$1,000,000, for any one claim event. There is also an aggregate limit that is the maximum amount the insurance company will pay in the policy term for all claims. An aggregate limit is usually a multiple of the occurrence limit like \$2,000,000. Once the limits are exhausted the insurance company will not pay anything regardless of how many claims there may be.

See **Contract Checklist** on page back cover

Loss Control Briefs

Winter in Texas

Texas is a long, tall state that ranges from sub-tropical to seemingly sub-arctic. The latitude of the lower Rio Grande Valley is the same as Bahrain in the Persian Gulf while the northern tier of Panhandle counties lies on the same line as Yokohama, Japan. The average winter temperature in Brownsville is 61.1 while in Dalhart it is 34.7. The record low in Brownsville was 15 and -21 in Dalhart. Texas is a state of huge variation in climate and conditions in all seasons. A below freezing low in Brownsville is rare, just as a well below zero extreme is in Dalhart. But they do occur and people who are potentially exposed to the extremes should take precautions. The following suggestions apply statewide:

- ★ Stay aware of local weather forecasts provided by the media or the National Weather Service. Just as with an approaching tropical storm, there is usually some notice of approaching frigid weather or other winter conditions.
- ★ If ice or snow are forecast, do your driving before the start of winter conditions. If you can, stay off the roads until temperatures warm above freezing.
- ★ Dress for the forecast conditions with layers and a head covering.
- ★ If you are transporting clients, make sure they are prepared for the cold as well.
- ★ Walking in icy conditions is almost as dangerous as driving in them. Be careful and if possible stay off ice. Use sand and salt at building entrances and steps.
- ★ If you must drive make sure your tires are properly inflated, you have a full tank of gas, a good battery, good wiper blades and a full reservoir of washer fluid. If your car is covered with a glaze of ice let it warm up so the defroster can clear the windshield.
- ★ Buildings can also be damaged by extreme cold, ice and snow. If there are water lines in attics and outside walls they can freeze and burst. It is a good idea to maintain heat in buildings that are unoccupied over a weekend or holiday and to let faucets drip when freezing temperatures are forecast.
- ★ If there is unrepaired hail damage, and it freezes, the roof could leak once it thaws. A lot depends on the severity of the hail damage. Members should check for maintenance of the roof and gutters after hail storms and before winter weather strikes.
- ★ If ice and snow are forecast watch where you park. Ice or snow sliding off roofs or power lines can damage vehicles and cause injuries.
- ★ If you have to work outside during wintry conditions because of a TXDOT contract, have the proper clothing and boots and a place to warm up.

Severe winter conditions are rare in some parts of the state and common in others. Be prepared by being aware of what is predicted and use common sense. Have a safe winter.

Zika Virus Update

The first case of locally acquired Zika virus infection was announced in Brownsville the week after Thanksgiving. That means local mosquitoes are now carrying the virus since the person infected had not traveled outside of Texas recently. The almost 300 cases of Zika identified in Texas prior to this were in people who had traveled to countries where the virus is endemic. The local acquisition of the disease raises questions about how an employer should handle a case of Zika that might have been acquired on the job and thus possible subject to workers' compensation coverage. The process of determining if the illness is compensable would begin with a thorough investigation to include securing medical records and obtaining a recorded statement from the claimant, questioning their recent travels, activities, etc. The main goal for the investigation is to determine if there is a causal connection to the employee's occupation. These types of claims are difficult to resolve and could end up in a Benefit Review Conference to determine if the employee's job placed them in a position where they were at a greater risk than the general public.

In Texas, insect bites and stings have been held not to be acts of God and are compensable when causation is established. It is not enough to show that the injury occurred while in the course and scope of employment.

- ★ A workers' compensation claimant must also prove that the injury was of such kind and character as had to do with and originated in the employer's work, trade, business or profession. *Standard Fire Ins. Co. v. Cuellar*, 468 S.W.2d 880 (Tex. Civ. App.-San Antonio 1971, writ ref'd n.r.e.).
- ★ To show causation, the claimant must prove that the conditions and obligations of the employment placed him or her in harm's way. *Texas Workers' Comp. Ins. Fund v. Simon*, 980 S.W.2d 730 (Tex. App.-San Antonio 1998, no writ.).
- ★ Employers whose workplace presents an increased risk for exposure to mosquitoes should be especially cautious (agricultural, outdoor maintenance, road construction) and look into extra preventive measures.

Claims adjusters struggle with insect bite compensability because the insects are rarely seen when the bite occurs. The adjuster has to look at where the employee was working to determine if their exposure was greater than the general public. Insect bite symptoms usually manifest very quickly and are localized to a specific area of a body.

Zika will pose some of the same problems as Lyme disease claims. The illness may take longer to manifest and could be more difficult to connect to specific date, time and place. Mild cases may be undetected at first and may go misdiagnosed until a severe or life-threatening illness requires the more expensive, disease focused testing or the employee becomes pregnant and there is a serious threat to the fetus for the birth defect known as microcephaly. The Zika virus has been shown to cause abnormally small skulls that carry many disabling conditions for the newborn child.

As a response to the possibility that Zika is now carried by mosquitos in the Rio Grande Valley (and likely to spread further north) Get Out Your Insect Repellant! - The US Centers for Disease Control (CDC) issued an alert about the spread of the Zika virus, and Texas is included in the CDC's estimate of the areas in the United States where the mosquitos are more likely to spread viruses like Zika, dengue, chikungunya and other viruses. The National Institute for Occupational Safety & Health (NIOSH) recommends employers protect workers and workers protect themselves by using preventative measures including: protecting equipment in the field, removing debris from ditches, filling in areas that collect standing water, removing tires, buckets and items that collect standing water, and placing holes in containers that could collect standing water where mosquitos may breed. The CDC and NIOSH have also provided a link for insect repellent safety at <http://www.cdc.gov/niosh/topics/outdoor/mosquito-borne/default.html>. Insect repellent clothing is also available.

New Department of Labor Overtime Rules Don't Go Into Effect December 1, 2016

The new Department of Labor rules regarding overtime thresholds for non-exempt employees were scheduled to go into effect on December 1, 2016. However a Texas Federal District judge issued an injunction until the issues raised by the several states attorneys general could be heard. On December 1, 2016 the Labor Department appealed the judge's decision so there is still uncertainty about when or if the rules will go into effect. In the interim most Fund members who would have been impacted by the new rules have already gone ahead with changes that would bring them into compliance with the rules. The threshold for the weekly wage that is not subject to overtime would be raised from \$455 to \$913. Employees making less than \$47,476 per year would now be eligible for overtime regardless of what their employment status was before the rule goes into effect. Aside from the additional payroll cost of the rule, what are some of the other consequences of the new rule?

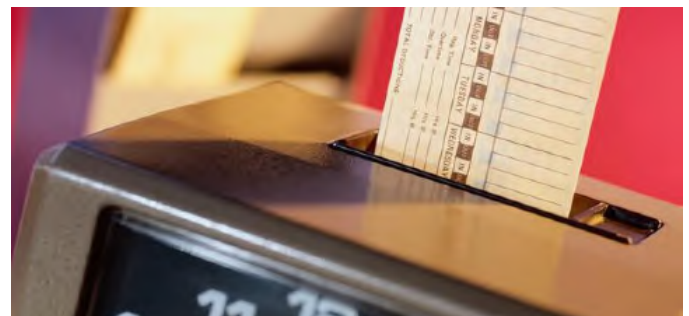
Employee benefits could be affected by the rule. The cost of providing life insurance and disability coverage could increase when the benefit amounts are based on multiples or percentages of annual salary/wages. The employer match

for contributions to employee retirement plans could also be subject to change. Many employers will probably adjust their contributions to keep the amount going into the plans static. However, any decrease in benefits could have an impact on employee recruitment or retention.

Another impact is the effect on employee flexibility particularly when the individual's status changes from exempt to non-exempt. The ability to take time off to go to a doctor's appointment or attend a child's assembly at school will now be subject to strict hourly accounting by both the employee and the employer. The cost of record keeping goes up as the flexibility to schedule time by the employee and the employer decreases. Formerly salaried employees will no longer be able to check e-mail after hours or complete on-line training at home because that kind of activity will put them back "on the clock." The valuable productivity enhancer of being able to work from home may also disappear.

One publication calls one of the effects of the rule "wage compression" where the differences in wages between salaried and hourly employees become much smaller. This could affect employee morale and lead to more turnover. Another result could be the unanticipated cost of raising the pay of numerous employees even a small amount. Finally, a more subjective cost may be the employer's diminished ability to reward quality of work when there is so much concern about hourly budgets and the possibility of violating the new rules even in minor ways.

The delay in implementation may give employers more time to adjust to the changes and anticipate some of the issues that may arise as unintended consequences. So far, there is no timeline on resolution of the issues raised in the lawsuits. Another element of uncertainty is whether or not the new administration will pursue an appeal or let the injunction stand. The basis for the injunction was that the Department of Labor did not have the statutory authority to make such substantive changes in the law and that only congress has that power. The Trump administration may leave the issue up to Congress.



Contracts Checklist, continued from page 3

Checklist Item: There are a number of other insurance provisions that should be in the center's contracts that help protect you. A brief listing follows, but a fuller explanation is available on the Fund's website at tcrmf.org.

- ★ The member should be listed as an "additional insured" on the contractor's general liability and automobile liability policies.
- ★ The general liability policy should include an endorsement providing for a contractor's "per location aggregate limit" so contractor claims occurring on other jobs won't exhaust the limits available to pay for claims on your job.
- ★ All of the contractor's policies should carry a "waiver of subrogation in favor of the center" to prevent the contractor's insurance company from coming after the center to try to recover amounts they paid out for claims occurring on your job or premises. This is especially important with construction contractors who now have strong limitations on hold harmless agreements in Texas law.

Most insurance companies who insure the contractors or vendors that work for the center will freely provide these endorsements though they may charge for them.

Another provision that can make a contract less costly in the worst case scenario of dispute and litigation is the venue for court action. Recent contracts reviewed by Fund staff included venues in New York City, Delaware and Illinois.

Checklist Item:

Texas public entities should have the venue for dispute resolution through mediation or litigation in Texas.

Finally, resist the convenience of signing the contract provided by the vendor, contractor or service provider. You are paying them so the center should write the contract. Use the model contracts provided by the Fund and modify them according to the situation. Also have your general counsel or attorney you use for legal matters review the contract. If you are unable to use your own contract form, try to modify the vendor or contractor's contract as much as you can to transfer risk.

Fund underwriting and risk management staff routinely review contracts for the provisions described here. Do not hesitate to send contracts to us for review. It is part of the Fund's mission to help members transfer risk to others.