

# Risk Advisor



WINTER 2018-19

## The Risk Managers Advisory Committee Announces the First Two Liability Workshops for 2019

The Risk Managers Advisory Committee of the Fund has announced the first two Liability Workshops for 2019. On January 25, 2019 the annual **Employment Liability Workshop** will be presented at the Menger Hotel in San Antonio following the HR Consortium meeting. On April 12, 2019, a **Cyber Security** workshop will be presented at the Westin Galleria in Houston. This workshop will also be the 100th workshop presented by the Risk Managers Advisory Committee. A celebration will take place that Thursday night before the workshop on Friday. Also this year, a **Claims Workshop** will be presented on September 20, 2019.

the Fund and how to utilize them most effectively to help prevent employment related litigation. A panel of Kendra Thomas and Sean McFarland from The Harris Center, Lisa Laky, Integral Care and Richard Wigzell, TCRMF, will discuss risk and security assessments and recommendations for employee and client safety in the security arena.

The **Cyber Security** workshop will be presented by experts in cyber coverage and breach (incident) response from Beazley LLC., the Fund's Cyber Liability syndicate at Lloyds of London. Beazley's presentation will focus on:



The **Employment Liability Workshop** will again be spearheaded by Pam Beach, General Counsel to the Fund. Elizabeth DeRieux a partner in the law firm of Capshaw DeRieux, L.L.P., has agreed to speak about the interrelationship between workers compensation, FMLA and the ADA. Bill Helfand a partner in Lewis Brisbois will bring us updates for arbitration agreements with staff to incorporate minor changes. He will also review recent developments and trends in EEOC actions and any significant new legislation or court precedents. Dan Hernandez, TCRMF, will give us insight into the Leadership Training resources of

- ★ Best Practices on Breach Response
- ★ Breach Response Methodology
- ★ Regulatory Landscape
- ★ Commonalities of Cyber Attacks
- ★ Best Practices on Crafting a Breach Response Plan

The full Beazley workshop will take most of the morning. Beazley recommends that centers should have staff from Legal, Risk, IT, Compliance, Privacy, HR, Physical Security and Corporate Communications in attendance due to the comprehensiveness of the

effects of an incident on the center and the many center operations that must respond to a breach. Additional information will be presented on recovery after an incident, vendors and contractors that can help in the response and recovery process and ways to strengthen the human firewall against intrusions. If you have questions about your Cyber Liability coverage, how breaches happen, how Beazley responds or any question about the current threat landscape you should plan to attend this workshop.

A **Claims Workshop** is presented every other year jointly with the Texas Water Conservation Association Risk Management Fund. This workshop will be presented September 20, 2019 at the Crowne Plaza Hotel in Austin. Topics will include Sovereign Immunity and the Texas Tort Claims Act, Cyber Security, Workers' Compensation issues and a Texas Legislative Update. Other topics may be added as issues arise during 2019. Please feel free to suggest claims related topics you would like to see in the workshop.

Flyers announcing the workshops and topics are usually sent about six weeks before the workshop. But if you are interested in attending any of these workshops you can register at [tcrmf.org](http://tcrmf.org) at any time.



# Texas Council Risk Management Fund

## Board of Trustees

**Mary Lou Flynn–DuPart, Chair**

The Gulf Coast Center

**Gus Harris, Vice–Chair**

Spindletop Center

**Steve Hipes**

Gulf Bend Center

**John Jackson**

Nueces Center for Mental Health and Intellectual Disability

**Rita Johnston**

Betty Hardwick Center

**LaDoyce Lambert**

PermiaCare

**Judge Dorothy Morgan**

MHMR Authority of Brazos Valley

**Hartley Sappington**

Bluebonnet Trails Community Services

**Judge Van York**

West Texas Centers

## Risk Advisor

Volume 30, Number 2

Published quarterly by the Texas Council Risk Management Fund. Questions, comments, criticism, suggestions and news are welcome and encouraged. Every effort is made to insure the accuracy of the information published in Risk Advisor. Opinions on financial, fiscal, legal and risk management matters are those of the editors. Consult your own professional counsel before taking any action or decision based on this material. The Fund administrator is York Risk Services Group at 800–580-6467.

## The Ten, No Eleven, No, Actually Sixteen Commandments of Center Contracts

A Workshop session that started out as the Ten Commandments of Purchasing and Contracts quickly grew to several more "commandments" when three very talented and competent contract overseers got together as a panel to present at the recent "Contracts and Purchasing" workshop sponsored by the Fund's Risk Managers Advisory Committee. Lisa Laky, General Counsel for Integral Care, Silvia Tiller, Director of Contracts and Real Estate for The Harris Center and Linda Bell, Director of Legal Services for the Gulf Coast Center presented their list of best practices for centers to adhere to for all contract and purchasing matters. The panel discussion lasted an hour and if they had more time the list might have grown even longer. Here is a summary of the primary recommendations from the panelists who are deeply and continually involved in the contracts that affect their centers.

**1.** A contract between a center and its vendors or contractors should contain an indemnification agreement in favor of the center. This is the primary mechanism for transferring risk away from the center. The vendor agrees to hold the center harmless and agrees to pay for that assumption of liability.

Model contracts with the recommended indemnification language were included in the workbook and are available on request. Occasionally the center may have to agree to an indemnification clause that is in favor of the vendor because that is the only way to get them to work for you and the center needs their services or product. In that case make sure the contract contains language stating "to the extent permissible by the Texas Constitution or State Law."

**2.** Do not agree to a limitation of the contractor's liability that is tied to the amount of fees the center has paid for their services. In the event of a catastrophic event caused by the contractor their limit of liability would be only the amount of fees the center had paid for their

services instead of the hundreds of thousands of dollars in damages or injuries their negligence caused. This kind of limitation is particularly popular with engineers, architects and IT or software consultants.

**3.** Require that the venue for any litigation or dispute be the center's home county in the State of Texas. The center wants the district court in the county where the center is based to have jurisdiction over any legal action involving the center and the contractor. Contracts prepared and ready for signature presented by the vendor may have venue in some very distant place like Delaware or New York. The best use of public funds requires venue to be in the center's home county. This also helps reduce or eliminate travel expenses and makes it easier to enlist supporting witnesses.

**4.** Auto-Renewal or automatic renewal of contracts is a sure way to propagate provisions that are not favorable to the center. Avoid a "renew as is" approach. All contracts should have a review process every year to check performance of the contractor, compliance with center insurance or other requirements and to re-negotiate terms and cost especially when funding levels

change. An automatic renewal could leave the center on the hook to pay for a contract when funding has been discontinued.

**5.** The panel does not like arbitration as a dispute resolution solution in center contracts with vendors, contractors or consultants. The center gives up too much of its potential recourse to damages and stymies the availability of funding for damages from the contractor's insurance.

**6.** Check documents that support the legitimacy of the vendor or contractor. The center wants to make sure that the vendor actually is a corporation or other type of legal entity that it claims to be. This is particularly true of new



entities or small businesses. Check W-9's, certificates of insurance, payment of franchise taxes, "dba" records and any other information about the chain of ownership that may be available.

7. If the provider of services uses a particular facility check the Fire Marshall's inspection report for occupancy and its compliance with fire code. Recommendations 6 and 7 relate to verifying the type of entity the center is dealing with and the adequacy and safety of the facilities they use to provide services to your clients.

8. Beware of hidden costs imposed by a vendor's contract especially in situations when the center must sign their contract or agree to their terms. Venue can impose a cost as well as compliance with their terms about how the center does business with them. Examples include the additional cost of a waiver of subrogation in the center's workers' compensation coverage. Higher limits of liability or endorsements providing additional insured status can also have a cost to the center.

9. Only a person who has authority to sign a contract and obligate the center can sign the contract. This is usually only the executive director of the center. Departmental directors and managers are not authorized signers.

10. Contracts cannot require disclosure of protected health information to anyone not authorized to receive it. Educators and law enforcement agencies may try to get the information, but they are not entitled to it. The center could face serious liability and fines if PHI is released.

11. Make sure that the scope and purpose of the contract are fully and specifically described and payment milestones are clearly defined and unequivocal. This helps with payment and in the annual evaluation of the effectiveness of the contract. If the performance milestones are contained in an appendix or annex make sure they are referenced in the contract proper.

12. The contract generally should not require full payment upfront. The center should pay for performance or on a percentage of completion basis. Construction contracts should withhold a significant percentage of total cost until the project is complete and all deficiencies or punch list items are corrected.

13. Do not sign a contract until it has been reviewed by the center's general counsel and others involved in negotiating and supervising the contractor's performance. Pam Beach can help and Gene McConnell and Richard Wigzell at the Fund can review contracts for indemnification and insurance matters.

14. The center should have contract management infrastructure so evaluation and renewal negotiations take place under supervision and follow a standard path through the agency. All original contracts should physically (or electronically) reside in the contract management department. Contracts that are kept in some other office because that's where they were negotiated avoid the standard treatment and renewal processing that protects the center. Even the executive director should not keep contracts (except a copy).

### TRADITIONAL CONTRACT



15. The friendly, congenial person who negotiates for the vendor or contractor is not your friend. They represent the vendor or contractor in their business dealings with the center and have a monetary interest in getting a signed contract from the center. This doesn't mean they are your enemy, just that you must maintain an objective and "arm's length" relationship with them during and after the bidding and contracting process.

16. Read every word of the contract, no matter how long it is or how many appendices or annexes it has. They are all part of the contract that binds the center.

Contracts form the lifeblood of a community center as the vehicle of service expectations and funding. The center has very little control over contracts with the Health and Human Services Commission but it can influence HHSC with solid arguments and effective communications. A center has more control over the contracts for services it pays for from local contractors or vendors. Transfer as much risk as possible through these instruments and call the Fund if you have any questions about a contract.

## Winter Driving and Other Considerations

Winter hit large parts of Texas weeks ago in mid-November. Houston saw its earliest snowfall on record and San Antonio broke its low temperature record. Places as far south as Lockhart had overnight lows in the teens with single digit lows in the Panhandle. Fortunately there was little precipitation with this blue norther that could have snarled roads, transportation and operations everywhere.

One of the scariest things to do in winter weather is driving. Ice and snow on the road affect every function of an automobile or truck. Steering can be inexact. Stopping or turning may be out of the question and visibility is limited by windshield accumulations of ice or road spray. What can the center do to avoid problems on snow or ice covered roads?

The best advice is to not drive. If roads are snow covered or icy local authorities will caution against driving for any reason. Centers should curtail client transportation until roads improve. And if conditions are bad enough, close offices and facilities that do not have to have staff working there.

If member staff do have to drive, use extreme caution when accelerating or braking. Keep speed low and start stopping long before you reach an intersection or other traffic. If the vehicle starts to skid out of control try to turn into the direction you are moving and avoid braking if possible. If the vehicle is equipped with chains, install them. Also it can be helpful to add additional weight in the trunk or truck bed to increase rear wheel traction. Use something heavy that will not easily slide or fly around in the event of a sudden stop or collision. If your tires lose traction and start to spin it's a sign that you should not be driving because the conditions where you are trying to start in motion are all over the roads ahead.



Make sure the windshield washer fluid is full and carry an extra gallon with you. Wiper blades that are worn or raggedy don't do a very good job of keeping windshields clean so replace them if necessary. Either start the vehicle before you need it to allow it to warm up and thaw accumulated ice or snow on glass or keep a scraper in the vehicle. It's very disconcerting to see other drivers peering through a small clear spot in their windshield as they try to drive past or behind you.

Cold weather also affects center facilities. Although it is an energy saving tactic to reduce the heat in a building over the weekend, be aware of the approaching cold weather and leave the heat on. The Fund knows how much damage can be caused by frozen water lines that snake through unheated attics, which may burst and flood IT offices and server rooms.

A mixture of sand and rock salt may cause a mess at entrances to your facilities but it also keeps people from slipping and falling on sidewalks, steps or parking lots. Shovel the snow off these areas before using the sand and salt for the best traction. Ice and snow accumulation on tree limbs, metal roofs and power lines can also be deadly if limbs fall or large sheets of ice fall on people or vehicles below. Be mindful of these hazards when you park or walk under awnings, trees or roof lines.

Most Texans are not used to the hazards posed by winter weather. Slow down and consider the potential consequences of being out in snow and ice and act accordingly. Make good decisions about requiring staff and clients to be out on dangerous roads with all those Texas drivers who infrequently experience hazardous winter driving conditions.

## Loss Control Briefs

**Safety Workshops** in 2018 were held at seven locations around the state with 174 center employees in attendance. Topics included

- ✪ Claims Analysis: An in depth look at the Fund's claims over the last five years.
- ✪ Active Shooter - Workplace Violence: safety and security planning for active shooter and other threatening situations.
- ✪ Emergency Preparedness: elements of center emergency plans, emergency drills and emergency action plans, and shared lessons learned from actual emergency situations.
- ✪ Falls: included fall hazard identification and how to reduce your risk.
- ✪ Infectious Disease and Other Exposures: risk reduction to infectious disease, blood-borne pathogens and other exposure risks.

Planning has begun for the 2019 series of Safety Workshops that will be held at several locations around the state. Topics under consideration for presentation in 2019 include a Claims analysis of the major claim causes for all centers, key elements of security assessments, field operations safety, driving safety and how to prevent sprains and strains. Dates and locations will be announced after the first of the year when you will also be able to sign up to attend at [tcrmf.org](http://tcrmf.org). Lunch and refreshments will be provided for all registered participants and there is no charge to attend.

### Safety Effort Focus

How does a community center decide where to focus its safety efforts? One of the measures of the effectiveness or lack of effectiveness of safety efforts is the cost of claims in key areas of operations. The Fund provides loss data that can help a member focus its efforts to reduce claims in certain areas just like the information presented in the Safety Workshops mentioned above. The following list shows total losses due to claims in major categories over the last five complete Fund years (September 1 to August 31 each year). The table shows total claims paid and reserved (Total Incurred), the number of claims reported and the average size of each type of claim:

### TCRMF Claim Totals 2013-2018

Line of Coverage	Number	Total Incurred	Average
Automobile Liability	474	\$ 3,602,896	\$ 7,601.05
General Liability	36	\$ 417,782	\$ 11,605.06
Errors & Omissions	109	\$ 2,634,989	\$ 24,174.21
Professional Liability	72	\$ 1,083,125	\$ 15,043.40
Workers Comp.	2,676	\$ 13,559,600	\$ 5,067.12

*Valued as of 8/31/2018*

What are the important considerations for your safety efforts presented in this table? One element is what area do we have the most control over from a safety standpoint? Workers Compensation claims affect the people we work with on a daily basis. Preventing claims for them would save pain, suffering, disruption to families and co-workers and possibly huge costs from complicated and prolonged medical treatment. It's not the highest average cost but over five years 2,676 of your co-workers have been injured on the job. Some of them never came back to work and many of them are going to run out of benefits for loss of wages. Medical expenses are covered for as long as treatment is related to the on the job injury but wage benefits end after seven years in most cases. Automobile liability claims affect members of the public, our clients and co-workers. Liability payments are made to those we injure when driving, but often a center employee is also hurt, sometimes very seriously. The cost of employee injury due to motor vehicle accidents is included in the workers' compensation totals.

The impact to center employees and others is highest with workers' compensation and automobile liability claims. These are also the claims we can have the most influence over collectively. Errors and Omissions claims mostly related to employment matters are also very expensive but like General Liability and Professional Liability there aren't that many compared to workers' compensation and automobile liability claims. Safety efforts in the workplace and emphasis on safe driving can reduce the human and financial cost to the center's most important resource – its employees.