

Contractual risk transfer (CRT) for commercial property owners



Accidents and property damage directly have a negative effect on your bottom line and insurance costs. One of the most common preventable injuries are slip and falls.[1] This type of injury is not only common but can also be very costly and this is just one type of injury or claim that a property owner can incur.

So how do you protect your business from these types of claims?

Commercial property owners are often concerned about filling vacancies, building maintenance or collecting rents, but one area that may not get as much attention as it should is contractual risk transfer (“CRT”). According to the Insurance Journal, CRT, “is a non-insurance contract/agreement between two parties whereby one agrees to indemnify and hold another party harmless for specified actions, inactions, injuries or damages.” Furthermore, “the ideal use and true purpose of contractual risk transfer is to place the financial burden of a loss on the party best able to control or prevent the incident leading to injury or damage.”[2]

In general, there are three components to a contract that should be in place at a minimum to help accomplish CRT protection – you should consult with an attorney for specific understanding and wording of these provisions to meet your specific contractual and risk transfer intentions:

- **Indemnification.** Indemnification is the duty to step in and make good for any loss, damage or liability which has been incurred by another. For example it could be a contractual obligation of the subcontractor to return the upper tier contractor (GC/Owner/Property Manager) to the same financial condition that existed prior to the loss.
- **Hold Harmless:** Essentially, the hold harmless clause of a contract absolves a party of legal liability. For example, this is when a subcontractor agrees to shield the GC or property owner and take on the legal liability that would have been placed on the GC/property owner.
- **Waiver of Subrogation:** This clause prevents the insurance company (who steps into the shoes of the insured after it pays a loss) from pursuing another party who likely caused the loss.

Two other important provisions in a contract are related to insurance coverages; these are additional insured and primary & noncontributory. A party that you hire and enter into a contract with should be required to purchase liability insurance and to include you on their policy as an additional insured. Your contract should also stipulate that the coverage will cover you as an additional insured must also be primary and noncontributory. For more on this topic see the IRMI Expert Commentary on this topic [at this link: https://www.irmi.com/articles/expert-commentary/primary-and-noncontributory](https://www.irmi.com/articles/expert-commentary/primary-and-noncontributory),[3]. Your insurance agent is a resource to help you navigate this process.



As you can imagine, contracts are very important and can be used to protect one party from damages such as insurance claims and lawsuits. We will go through several situations where CRT should be considered.

What commercial property contracts should contain CRT language?

To start, a property owner can emphasize and evaluate CRT in written lease agreements, written contracts for hiring contractors, and property management agreements. All of these are important because, as the property owner, you want to be sure that your assets are fully protected.

Lease agreements

A written lease agreement should always be in place to protect from claims and lawsuits; there are many aspects to consider when drafting a lease agreement so an attorney should always be consulted. Some important areas to consider when drafting a lease are who is responsible for building maintenance (including common areas and parking lots) and the language used in the hold harmless, indemnification and subrogation clauses. Developing the right language in these areas and others may protect the property owner and illustrates why working with an attorney familiar with real estate law is so important.

It is also important to clearly indicate insurance requirements in your lease and to obtain a copy of tenants' insurance policies and declaration pages annually. Many insurance professionals suggest obtaining a copy of the full policy to allow for a full understanding of all terms and conditions included within the policy to identify any exclusions. However if the policy is unavailable a certificate of insurance (COI) at a minimum should be obtained annually. While reviewing certificates of insurance and policies, look at policy expiration dates to ensure they remain current. It is important to note that a certificate of insurance is only evidence of insurance at the time the certificate is issued. The certificate does not confer any rights to the certificate holder.

Contractor agreements

Another important type of contract to have in place as a real estate owner are those with contractors who are hired to work on your property, this could include plumbers or electricians, HVAC maintenance contractors, landscapers working on exterior spaces or those hired for larger construction jobs.

A well written contractor agreement ensures that liability lies with the party most responsible for preventing a loss such as an injury to a worker or visitor, property damage or a construction defect. Having a contract in place prior to work beginning allows all parties to agree on how the potential risk associated with work being done will be allocated.

Property management contract

Finally, if you work with a property management firm you will want to use a written contract for this arrangement as well. This type of legal document between a real estate owner and property management firm should clearly state what the management firm is responsible for, such as an outline of maintenance schedule/repairs and housekeeping, policies for responding to tenants, and other components.

In addition to these details, this contract should also include legal protections like hold harmless and indemnification clauses as well as insurance requirements.

Contract management process

1. Qualified staff in place with central oversight
2. Effective tracking of COI and contract renewal dates
3. Established guidelines for contract acceptance
4. Contract language review by attorney
5. Use of standard release and subcontract agreements

A big piece of the contractual risk transfer puzzle is contract and insurance policy/certificate of insurance management. Having these steps in place will help ensure your contracts are valid, up to date and that insurance policies and certificates of insurance are maintained.

Where to find assistance

To ensure your business is fully protected, all business partnerships should be governed by a contract. For assistance in developing a solid contract, we suggest always working with an attorney who is familiar with real estate and contract law. Additionally, an attorney should also be consulted prior to signing a contract that is provided to you.

Lastly, your insurance agent is available to assist with insurance program needs and Hanover Risk Solutions consultants are available to help navigate the contractual risk transfer program with you.



References

[1]Injury Facts National—Top 10 Preventable Injuries. (2021) Retrieved from National Safety Council: <https://injuryfacts.nsc.org/all-injuries/deaths-by-demographics/top-10-preventable-injuries/>.

[2]Boggs, C.J. (2015, March 16). Academy Journal Contractual Risk Transfer: The Basics. Retrieved from Insurance Journal: <https://www.insurancejournal.com/blogs/academy-journal/2015/03/16/360274.htm>.

[3]Stanovich, Craig. (2018, December). Retrieved from International Risk Management Institute, Inc. (IRMI) Expert Commentary—Primary and Noncontributory. <https://www.irmi.com/articles/expert-commentary/primary-and-noncontributory>.

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