

# Help reduce your exposure arising from the use of subcontractors

By using proper risk transfer, you can also save money on your insurance premiums.

This brochure was created as a resource for contractors and subcontractors who oversee or perform construction work for the owners of commercial, industrial and residential properties across America. Once you review the fundamental principles highlighted on these pages, we invite you to use our *Risk Transfer Setup Guide for Contractors* to walk you through the process of establishing proper risk transfer for your business.



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is on your side

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## What every contractor in America should know

As a contractor, you are regularly required to oversee and/or perform construction work on behalf of the owners and managers of America's properties. During the course of that work, you are often called upon to contract for necessary repairs, maintenance or upgrades with a variety of subcontractors. The work performed by those subcontractors may result in property or bodily injury claims arising from an action (or failure to take action) by the subcontractors' employees or other third parties. The likelihood of a contractor suffering unintended liability for losses also increases substantially with the hiring of uninsured subcontractors.

Common subcontractor services include:

- Plumbing, carpentry, electrical and HVAC
- Landscaping and snow removal
- Janitorial and building maintenance or alteration
- Sidewalk and parking lot repair
- Elevator and escalator repair
- Security and fire protection
- Pool and fitness center supervision and/or maintenance
- Catering

Any time your company is named in a claim, it can result in higher premiums. But the exercise of competent risk transfer procedures through the use of legally reviewed contracts is a risk management best practice that can help to reduce disputed injury claims and litigation in cases where you hire subcontractors to do work for you.

### ***'But I'm a contractor — not a lawyer or insurance professional.'***

Executing contracts and risk transfer agreements are common practices in your industry. Written contracts can be short and simple. Choose a competent and qualified attorney to review your contracts, risk transfer agreements and procedures. You may also want to consider using standard contracts from the following sources:

**[aiacontracts.org](http://aiacontracts.org) | [consensusdocs.org](http://consensusdocs.org)**

Your insurance agent can provide additional assistance such as identifying insurance companies that limit or exclude contractual liability coverages — which could increase your liability because a responsible party's insurer may not pay a claim owed by that party. In matters involving legal liability, it's especially important to seek professional advice.

## Why transfer risk?

Below are three scenarios that illustrate how incidents involving subcontractors can lead to lawsuits against the contractors that hire those subs to do work. Keep in mind that lawsuits and claims can't always be avoided, but risk transfer can help reduce any amounts paid under your policy, and that helps keep your premiums lower.

### **EXAMPLE #1 - GENERAL CONTRACTOR SUED BY DEMOLITION SUBCONTRACTOR'S EMPLOYEE**

A property owner hires a general contractor (GC) for a project to expand their facility. The GC hires a subcontractor to tear down a portion of an existing building in preparation for the new addition. One of the sub's employees falls from the roof. The employee is not wearing fall protection and sustains serious injuries. The injured employee sues the GC and the property owner, claiming they failed to have a proper safety program and adequate supervision.

### **EXAMPLE #2 - GENERAL CONTRACTOR SUED FOR INJURIES TO PAINTING SUBCONTRACTOR'S EMPLOYEES AND FOR PROPERTY DAMAGE**

A GC hires a painting company to improve the exterior of an upscale apartment building. When scaffolding unexpectedly collapses, several workers are injured and one is permanently disabled. There's also damage to the building's façade. The painters have no insurance, and the GC is ordered to pay workers' compensation benefits in addition to paying \$300,000 to repair the building.

### **EXAMPLE #3 - SHIPPING COMPANY FACING LOSSES DUE TO MECHANIC'S FAULTY WORKMANSHIP**

A shipping company owner hires a local mechanic as an independent contractor to service their large truck fleet. An employee of the shipping company, driving a truck that had recently been serviced, is involved in an accident resulting in a fatality to another driver and serious injuries to the shipping company employee. An investigation reveals the cause of the accident was due to an improper brake installation by the mechanic.

In all cases, properly transferring the risk via contract to the subcontractor may have avoided:

- Liability for the loss
- Significant legal expenses
- The potential for increased insurance premiums





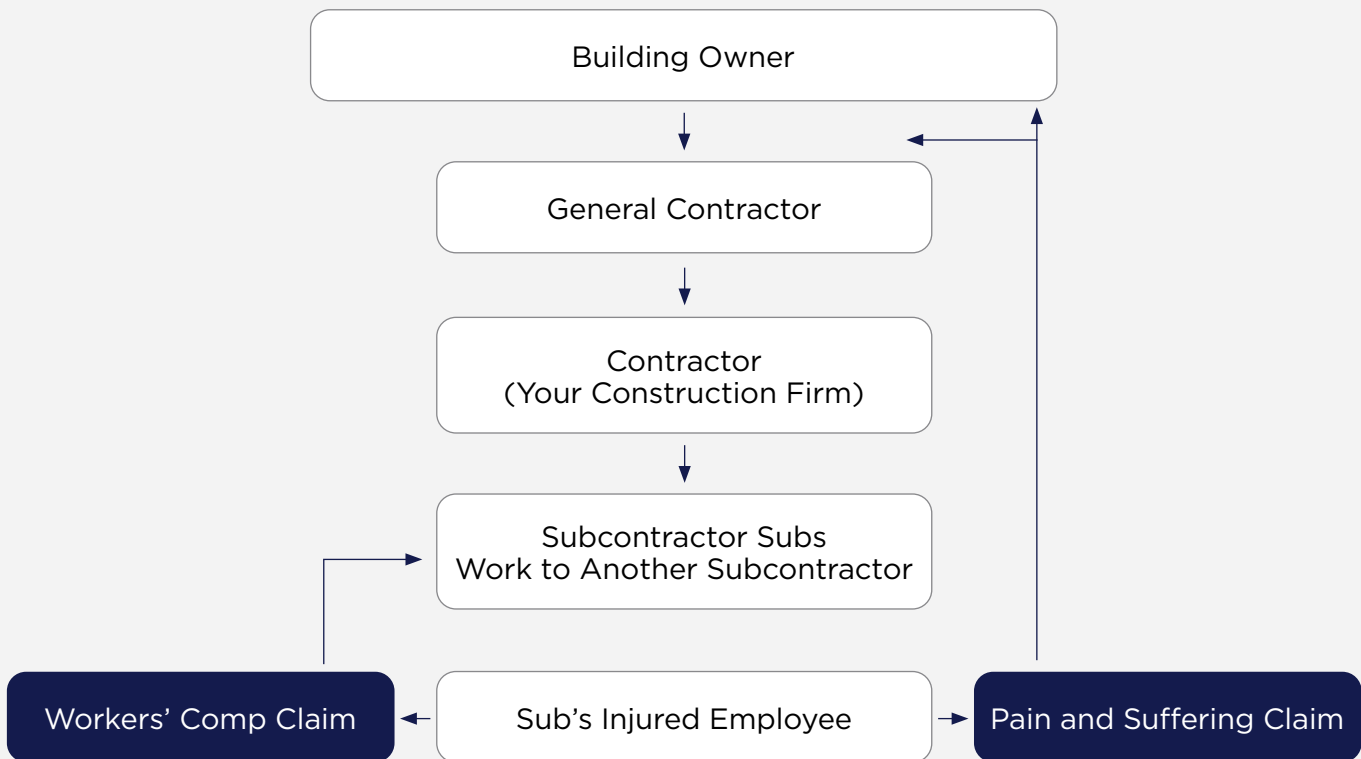
## Risk transfer is your best defense

In risk transfer written agreements, one party assumes the liability for another. With good risk transfer language in place, the contractor and owner are much more likely to be defended, indemnified financially and held harmless should there be an insurance claim or lawsuit. Without good risk transfer procedures in place, your company or insurance carrier may be responsible for monetary awards.

### LIABILITY FLOW WITH RISK TRANSFER MECHANISMS

In this example, the contractor (i.e., your construction firm) can, by way of the risk transfer mechanisms discussed in this brochure, transfer the ultimate responsibility to pay a pain and suffering award down to your subcontractor.

### LIABILITY FLOW WITH PROPER RISK TRANSFER





## Using written contracts to execute risk transfer.

Below are examples that illustrate how written contracts can be used to execute risk transfer, and Nationwide® suggests that you view these as the eight essential minimum requirements of any agreement you sign with a subcontractor. Keep in mind, however, that this information is provided solely to help you gain an understanding of risk transfer methods. You should enter into a contract only after seeking the counsel of a qualified attorney, and these examples should not be viewed as a substitute for legal advice. Also, state law may vary on the enforcement of these provisions.

### 8 ESSENTIAL MINIMUM CONTRACT REQUIREMENTS

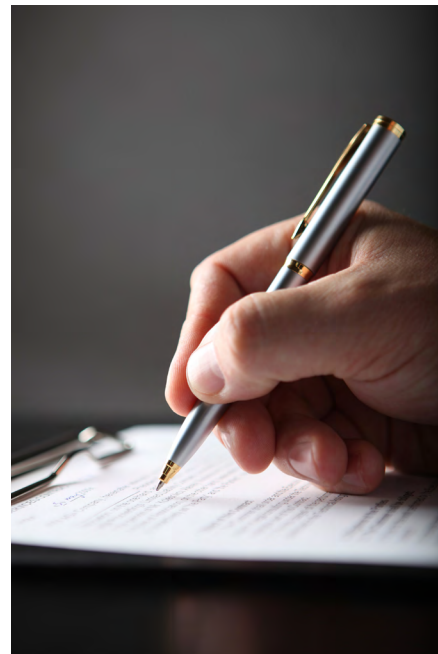
#### 1. HOLD HARMLESS/INDEMNIFICATION AGREEMENTS, AND WAIVER OF WORKERS' COMPENSATION IMMUNITY

Hold harmless/indemnification agreements generally specify that the party performing the work (i.e., your subcontractor) will hold you (i.e., the contractor) harmless for any losses that may arise as a result of work they perform. In many states, such agreements are considered void if they require the subcontractor to accept responsibility for the sole negligence of the hiring contractor. A contract might be upheld if it contains what is sometimes called "saving language." This is a phrase that usually states "to the fullest extent permitted by law," as in the following example.

Example of saving language: *"To the fullest extent permitted by law, the party performing the work under this agreement, hereby known as the contractor, shall defend, indemnify and hold harmless the property owner and property manager and their agents for whom the work is performed, for any liability, loss, or other claim for damages for death, bodily injury or property damage arising out of performance of the work by the contractor or any agent, servant, employee, subcontractor or supplier of the contractor, except to the extent of any fault attributed to the property owner and property manager."*

Also, in some states your subcontractor's obligation to their injured workers is limited to workers' compensation benefits. A waiver of the workers' compensation immunity requirement (see example below) bars your subcontractor from using this defense when their employee is injured on your job.

Example of workers' compensation immunity requirement waiver: *"The indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the contractor or any such subcontractor, supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts."*



Hold harmless and indemnification agreements are key to the successful transfer of risk to subcontractors.



When a loss occurs, you want your subcontractor's insurance to respond first, that is, on a primary and non-contributory basis.

## 2. GENERAL ACCEPTANCE PROVISION

Any work order, contract or similar document should contain or reference a hold harmless/indemnification provision (see 1 above) and an insurance requirements/additional insured status provision (see 3 below). These provisions should specify that the act of beginning the work will be considered an acceptance of the terms of the contract, work order, or similar document. With regard to service work which may be done throughout the year, it should be expressly stated in writing that these requirements remain in effect until otherwise agreed in writing.

## 3. ADDITIONAL INSURED COVERAGE, AND MINIMUM INSURANCE REQUIREMENTS AND LIMITS FOR SUBCONTRACTORS

Insurance procurement requirements call for additional insured status for ongoing operations and completed operations on your subcontractor's general liability (GL), auto and umbrella policies on a primary and non-contributory basis. Consult our *Contractor's Checklist: Minimum Contract Insurance Requirements and Limits* (#CMO-0770AO) to see what Nationwide recommends as minimum insurance limits for your subcontractors.

Be cautious. In an attempt to save premium dollars, some subcontractors purchase insurance from non-standard insurance carriers. While some of these carriers provide reasonable levels of coverage, others exclude primary liability exposures, even if such liability was assumed by the subcontractor in the contract with you (such as employee injuries). This hold harmless obligation coverage gap can result in your subcontractor being virtually uninsured for certain types of losses. This increases your liability exposure and problems with your insurability. *Please consult with your agent to make sure your subcontractors have adequate insurance coverages and limits.*

It's also essential that your subcontractor carry workers' compensation coverage for the states related to the contract. If that's not the case, the subcontractor's employees' wages may be added to your payroll as if they were your employees, and you may be responsible for their injuries. If your subcontractor is an individual or partnership, then confirm that he/she has elected to be covered by the workers' compensation policy.

## 4. REQUIREMENT THAT THE SUBCONTRACTOR'S INSURANCE RESPOND FIRST

When a subcontractor is hired, they generally have control over their work and the condition of their work area. The subcontractor has primary control over how safely the work is done. When a loss occurs, you want the subcontractor to have primary responsibility for the loss. To ensure that the subcontractor's insurance pays first (ahead of your coverage), it's essential to clearly state in your contract that the subcontractor's coverage (GL, auto and umbrella) shall respond first, that is, on a primary and non-contributory basis.

## 5. REQUIREMENT THAT THE CONTRACT APPLY TO SUBS OF YOUR SUB

It's important to state in the contract that all obligations and requirements of the contract apply to any parties or subcontractors hired by the subcontractor. Too often, losses are caused by parties/ persons hired by your subcontractor. By stating these requirements must be passed on to any subcontractors hired by your subcontractor, you create additional protection for your business.

## 6. CERTIFICATE OF INSURANCE REQUIREMENT

A certificate of insurance should be provided to your firm prior to the commencement of work as evidence the subcontractor is maintaining its own GL and workers' compensation insurance with sufficient limits to cover a significant loss. The certificate should show the contractor and owner as additional insureds for ongoing and completed operations on a primary and non-contributory basis. A requirement should exist that the subcontractor's insurance policies be endorsed to guarantee you a right to notice of cancellation.

A certificate of insurance provides evidence that particular types of coverage are in force at a particular time. It also lists the limits of coverage in force at the time coverage was issued. It is most commonly used to provide the certificate holder (e.g., you or your customer) with evidence that certain insurance requirements have been met. However, a certificate of insurance alone does not guarantee the policy will be in effect at the time of the loss.

No subcontractor should be permitted to enter your job site without first providing an up-to-date certificate of insurance. The ACORD Certificate of Insurance form has become the industry standard. It provides evidence of the types of coverage as well as endorsements to the commercial general liability (CGL) policy. The type of coverage, name of insurer, policy term and limits of coverage are the typical entries on the form. It provides a brief summary of the coverage in force when it was issued. Since it provides information only, it does not constitute a contract between the insurer and the certificate holder.

Also, a certificate is not a guarantee that the policy doesn't contain additional exclusions/coverages. Additional insured status serves as a backup to the indemnity agreement. In certain cases, the blanket additional insured endorsement is only effective if required by a written contract or agreement.

### A closer look at certificates of insurance

See our brochure for a convenient overview of certificates of insurance. You'll learn what to look for on your subcontractor's certificate and find a brief description of each section of the form with a sample to review. Ask your insurance agent or Nationwide representative for form #CMO-0359AO



## 7. WAIVER OF SUBROGATION

The subcontractor should agree to waive any and all rights of subrogation against the contractor (i.e., your construction firm) and property owner. Waivers of subrogation for GL, auto, umbrella and workers' compensation policies must require the subcontractor to waive their insurer's right to be reimbursed by you should a loss occur that was a result of your negligence.

## 8. SAFETY PROGRAM REQUIREMENT

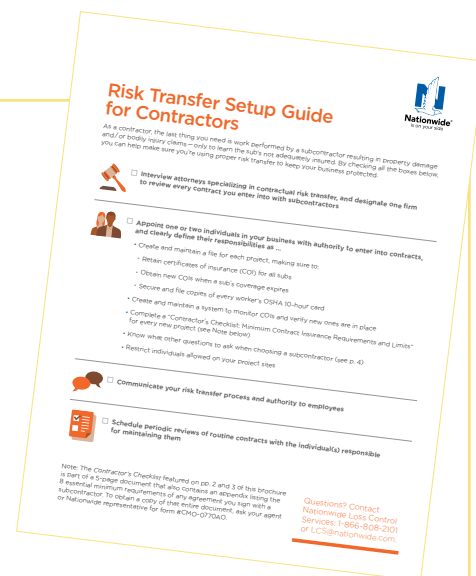
Contractors put a lot of time and energy toward creating safety programs and manuals. Keeping workers and others visiting the work site safe is essential. An important contract requirement is to ensure subcontractors follow the same safety requirements as your own employees. Including this requirement in your contract should alert your subcontractor that safe work practices are expected. An accident-free work site is a reflection on your business and impacts your insurance premiums and reputation.

### Risk Transfer Setup Guide for Contractors

Use our guide as your roadmap to effective contractual risk transfer for your construction business. In this 4-page document, you'll find:

- Step-by-step instructions for establishing your program, starting with appointing an attorney well-versed in the area of risk transfer
- A checklist for verifying minimum contract insurance requirements and limits with your subcontractors
- A list of additional questions to ask when choosing a subcontractor

To obtain a copy of the *Setup Guide*, ask your insurance agent or Nationwide representative for form #CMO-0821AO, then contact them with any additional questions.



Providing solutions  
to help our members  
manage risk.®

For your risk management  
and safety needs, contact  
Nationwide Loss Control  
Services: 1-866-808-2101  
or [LCS@nationwide.com](mailto:LCS@nationwide.com).