



LOSS CONTROL SERVICES

Help reduce your exposure when using subcontractors



This resource was created as a guide for contractors and subcontractors who oversee or perform construction operations on jobsites across America. Once you review and understand the basic purpose of risk transfer and the fundamental principles, 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.

Risk transfer is the right choice for contractors.

What every contractor should know

As a contractor, you are regularly required to oversee and/or perform construction work on behalf of owners, developers and other contractors. During the course of that work, you are often called upon to contract for specific scopes of work that you do not have the expertise, tools or equipment to perform. This subcontracted work could result in property or bodily injury claims arising from an action (or failure to take action) by the subcontractors' employees or other lower tier contractors, thereby putting your business at risk. The likelihood of a contractor who subcontracts the work suffering unintended liability for losses also increases substantially with the hiring of uninsured or unqualified subcontractors.

Subcontracted work can include all types of construction, service or repair work. Work can include traditional construction trades to specialty trades such as air balancing, concrete cutting, testing, etc. Subcontract work can include both long- and short-duration jobs, and can range from contract values in the millions to contracts valued in hundreds of dollars.

Experience has shown that cost of contract does not equal potential exposure of the work. Therefore, Nationwide recommends risk transfer procedures be in place for all subcontracted work regardless of dollar or duration.

A comprehensive risk transfer program can help mitigate or offset some of the financial risks that are inherent to construction projects. Nationwide recommends exercising a layered approach to protection. This can include subcontractor pre-qualification, certificates of insurance, additional insured status and executed contracts with indemnity agreements that have been developed by an attorney who specializes in construction contract law.

“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 industry contracts from aiacontracts.org or 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 eliminate or reduce amounts paid under your policy, which can 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. A sub's employee falls from the roof. The employee is not wearing fall protection and sustains serious injuries. Due to inadequate risk transfer, the injured employee successfully sues the GC and the property owner, claiming they failed to have a proper safety program and adequate supervision. In addition to receiving workers' compensation benefits, the injured employee may also file suit against the general contractor seeking additional damages due to jobsite supervision or unsafe working conditions.

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.

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

Record Retention

The final piece to a comprehensive risk transfer program is record retention. It is critical that defensible docs such as, executed contracts, specifications, change orders, drawings, etc. be retained in accordance with state or federal requirements. Consult with legal counsel to determine the appropriate time to retain or utilize a 10 year minimum retention period.



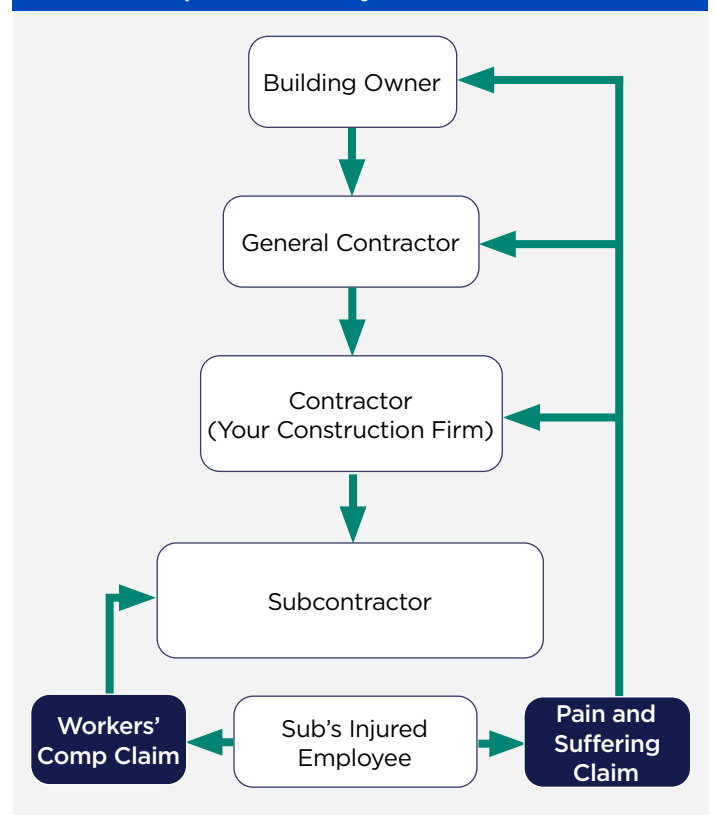
Risk transfer is your best defense

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 and litigation costs.

Liability flow with risk transfer mechanisms

In this example, the contractor (i.e., your construction firm) can shift the responsibility down, via contractual risk transfer, to the party who controls the work (subcontractor) and who should bear responsibility for at fault outcomes (i.e., pain and suffering claims).

Potential path of liability on a construction site



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.



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

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."*

2. General acceptance provision

When utilizing a master subcontract agreement (MSA), ensure the work order or similar document reference the master agreement to include all indemnification and insurance provisions contained within. 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](#) 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. *A best practice would be to ensure that subcontractor's insurance carriers are A rated or above and to conduct insurance reviews and verifications steps with your agent or broker.*

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 responds 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 prime contract apply to any parties or subcontractors hired by the subcontractor. These clauses are often referred to as flow-down or flow-through clauses. 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.

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

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 resource](#) 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.

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

The [Setup Guide](#) is available for download or print at MyLossControlServices.com. Contact your insurance agent with any additional questions.



Providing solutions to help our members manage risk.®

For your risk management and safety needs, contact Nationwide Loss Control Services at 1-866-808-2101 or MyLossControlServices.com

The information used to create this brochure was obtained from sources believed to be reliable to help users address their own risk management and insurance needs. It does not and is not intended to provide legal advice. Nationwide, its affiliates and employees do not guarantee improved results based upon the information contained herein and assume no liability in connection with the information or the provided suggestions. The recommendations provided are general in nature; unique circumstances may not warrant or require implementation of some or all of the suggestions. Nationwide, the Nationwide N and Eagle, Nationwide is on your side and Providing solutions to help our members manage risk are service marks of Nationwide Mutual Insurance Company. © 2024 Nationwide CMO-0390AO.6 (05/24)

