

OSBORN

Take Steps to Avoid Liability Before Contractors' Employees Get Injured

Shopping Center Management Insider, February, 2002, Insider Sources: John E. Osborn, Esq. and James W. Evans Jr., ARM.

When you hire independent contractors to perform work at your center, you risk being sued if any of the contractors' workers are injured on the job. That's because workers' compensation laws limit how much money injured workers can get from their employers. So injured workers looking for big damage awards often sue owners and managers who hire their employers.

We'll tell you how to avoid being held liable if an injured worker sues you. We also give you a Model Contract Clause to put into your agreements with independent contractors (Editor's note: please see table below). The clause will help protect you if one of the contractor's employees is injured.

Model Contract Clause Protect Yourself Against Lawsuits by Contractors' Employees

Here's a contract clause we drafted with the help of insurance consultant James W. Evans Jr. and attorney John E Osborn. It states that the contractor is responsible for any injuries that occur in connection with its work. It's also a promise by the contractor to defend and indemnify you if you're sued. Ask your attorney to help you adapt the clause for your center.

Indemnification

To the fullest extent permitted by law, Contractor agrees to defend, indemnify, and hold Owner, Owner's Property Manager, and their employees, agents, officers, and servants harmless from any claims, damages (including property damage and loss of use of such property), losses, fines, or penalties (including related costs, expenses and reasonable attorney fees) that may arise in whole or part from Contractor's work on behalf of Owner. This includes but is not limited to claims, demands, damages, losses, fines, or penalties for injuries to persons or damage to property, including theft, resulting from Contractor's acts or omissions or the acts or omissions of those persons furnished by Contractor.

Project Control Could Result In Liability

In most states, the risk that an owner or manager may be held liable for injuries to a contractor's employee increases if the owner or manager had some control over the contractor's work. How much control it takes to increase the owner's or manager's risk will vary depending on the facts of each incident.

Example #1: A contractor's employee was injured and sued the property owner, claiming that the owner had sufficient control over the project to be liable for his injuries. The owner claimed that it didn't have enough control and asked the court to dismiss the case without a trial.

The Delaware court refused to dismiss the case and ruled that a trial was necessary. The owner had its own engineers coordinate and schedule the contractor's work. It controlled where and when each phase of the work would be done, told the contractor how many employees it could use, and provided the contractor with all the materials, tools, and equipment it needed for the project. That degree of control was enough to allow a jury to hold the owner liable, the court said [*Rabar v. E.I. DuPont de Nemours*].

Example #2: In another case in Delaware, a contractor's employee was killed while working on a project. The employee's family sued the owner, claiming that the owner had enough control over the project to make it liable for the employee's death. The owner claimed that it had practically no control over the work.

The court ruled that the owner wasn't liable for the employee's death because there was no evidence that the owner had any control over the work. The owner's only role was to coordinate and schedule all the subcontractors on the project and direct when and where different aspects of the work would be done. But any owner would have to do that to get a project done, the court said. The owner would have to have exercised much greater control over the project's day-to-day activities in order to be held liable for the employee's death [*Jiz Shu Li v. Capano Builders, Inc.*].

Take Three Steps to Protect Yourself

To make sure your situation is more like the second case, take the following three steps, suggests insurance consultant James W. Evans Jr.:

1. **Put a defense and indemnification clause in the contract.** A defense and indemnification clause is a promise by the contractor to defend you if one of its employees sues you, and to pay your damages if you lose or settle the lawsuit. "Even if you win a lawsuit filed by a contractor's employee, it will be expensive to fight," says John E. Osborn, a New York attorney. **Insider Says:** It's a good idea to require your contractor to carry insurance. A defense and indemnification clause won't help you much if the contractor doesn't have any money.
2. **Don't get involved in day-to-day control over the project.** Keep your involvement to the bare minimum necessary to direct the contractor, says Evans. You can specify the work to be done and the schedule the contractor must meet, but don't get involved in the day-to-day running of the project. Let the contractor use its own tools and equipment and let it make its own decisions on how best to meet your requirements.
3. **Don't communicate directly with contractor's employees.** One sure way to make it look as if you're exercising control over a contractor's employees is to communicate directly with them. So avoid doing it. For instance, if you want to tell a contractor's employee not to track mud into the center, tell his employer. The employer should pass on the message. Make sure your staff knows not to communicate with the contractor's employees, too. You can break this rule to avoid an accident you see brewing, says Evans, adding, "If you see an employee about to back up into a hole, you obviously should warn him."

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