

How to Protect Your Facility by Having Third Party Contracts in Place

Every contract has risks that must be reviewed from the perspective of protecting your entity and assets. This document is designed to provide you with guidelines and tools to help you manage those risks and to consider the regulatory and liability implications from contracted services.

Inherent parts of contract management include:

1. Evaluating the risks involved;
2. Deciding whether to avoid, transfer, or accept the risks, and;
3. Implementing appropriate risk transfer and or risk financing mechanisms.

Read each contract thoroughly and anticipate events or situations that could happen within the scope of the work outlined. Within the contract, risk transfer is accomplished through a combination of indemnification, hold harmless clauses, and waiver of subrogation clauses. Insurance is commonly required as a means of providing the financial support to back the Indemnitor's obligation to hold another party harmless.

Regulatory Consideration:

According to F840, if the facility does not employ a qualified professional person to furnish a specific service to be provided by the facility, the facility must have that service furnished to residents by a person or agency outside the facility under an arrangement, agreement or contract. The arrangement, agreement, or contract must specify in writing that the facility assumes responsibility for obtaining services that meet professional standards and principles that apply to professionals providing services in such a facility and the timeliness of the services.

Therefore, the facility is required to have contracts with all third party vendors that provide contract services. Contracts may include:

- Clarification of services/scope of work
- Timeliness of the services
- Payment arrangements of the services/compensation
- Clarification of reporting/documentation requirements
- Staff training requirements, screening, licensure, etc.
- Confidentiality/HIPAA Clause
- Contract terms
- Period of agreement
- Termination of agreement

Risk Management Considerations:

All contracts should contain language obligating the consultant, contractor, or vendor to indemnify, defend, and hold harmless your entity from and against any and all claims or losses arising from injury to persons or damage to property as a result of an act or omission of the consultant, contractor, or vendor. Different states or laws should be considered when drafting the following clauses within your contracts.

From the risk management perspective, the following additional clauses should be considered for inclusion in contractual agreements:

- **Independent Contractor provision** – This clause would be added to clarify that the contractor is not a facility employee and therefore not subject to any benefits, such as, but not limited to, the facility's worker's compensation benefits, unemployment benefits, social security benefits, etc. The contractor is obligated to pay all federal and state income tax on any moneys earned or paid pursuant to this agreement.
- **Hold Harmless provision** – This clause clarifies that the vendor or independent contractor releases your entity from all liability for any loss or damage and any claim or demands for damages. A hold harmless agreement is designed to release one or more parties from legal liability. In a standard agreement, one of the parties essentially agrees not to sue the other for certain kinds of expenses, losses, or damages that may result from the relationship or provision of services. These agreements may address claims that arise between the contracting parties themselves, or they may only protect a contracting party from claims brought by a person or entity who is not a party to the agreement.
- **Indemnity Agreement provision** – "Indemnity" is defined as "a duty to make good any loss, damage, or liability incurred by another (Black's Law Dictionary). Indemnity has the general meaning of "hold harmless;" that is, one party holds the other harmless for some loss or damage. Indemnity also includes an understanding that an injured party has a right to claim reimbursement or compensation for a loss or damage against the person who has the duty. Indemnity can also refer to compensation for loss or damage from the actions of another party. Additionally, indemnity can be described as a legal exemption from loss or damages. An indemnity agreement is contract language that indemnifies one of the parties in a contract for specific actions that might cause damage to the other party.

Example. To the fullest extent permitted by law, the contractor (party name) will indemnify and hold _____ (your entity name) harmless from all claims arising from and in connection with (1) the provision of services in this agreement; (2) any act, omission, or negligence of the contractor (party name) (3) any accident, injury, or damage whatsoever occurring except where the injury or damage is caused by our (your entity name) sole negligence. Any amount of fault on the part of the indemnitor obligates the indemnitor to indemnify us (your entity name) for the total amount of damages. **See Page 4 for sample language for liability waiver, indemnification and Hold Harmless Agreement.**

Each contractual relationship should require the vendor or independent contractor to secure insurance coverage specific to the services to be provided to the facility. At a minimum, the insurance coverage to be secured would be Worker's Compensation, Commercial General Liability, and Professional Liability. Additional or different types of insurance should be considered based upon the type of agreement and or services. A certificate of insurance listing your entity as a certificate holder should be obtained annually.

As a prudent risk management practice, the following **annual** practices should be in place:

- Maintain a listing of all current third party vendors
- Secure current certificate of insurance
- Monitor the List of Excluded Individuals and Entities (LEIE)
- Review contract language to verify inclusion of independent contractor provision, hold harmless provision, and indemnity agreement provision

We recommend that each facility consult with Corporate Counsel on the usage of appropriate language in all third party contracts.

We would like to emphasize that the discussion set forth above is only an insurance/risk management perspective and is NOT legal advice. We do not provide legal advice as we are not qualified to do so. We highly recommend that you seek the advice of legal counsel in order to become fully apprised of the legal implications related to these issues.

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Liability Waiver, Indemnification and Hold Harmless Agreement

I hereby **RELEASE, WAIVE, DISCHARGE, HOLD HARLESS, INDEMNIFY** _____ its parent and affiliated companies, their officers, servants, agents, and employees (hereinafter referred to as **RELEASEES**) from any and all liability, claims, demands, and causes of action whatsoever arising out of or related to any loss, damage, or injury, including death, that may be sustained by _____, its employees, agents, invitees, students or anyone arising from the use of _____ by _____ for the purposes of _____.

I HEREBY RELEASE, WAIVE, DISCHARGE AND COVENANT NOT TO SUE the **RELEASEES** from all liability to the undersigned, their personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefore on account of injury to the person or property or resulting in death of the undersigned, however caused based upon the event or while the undersigned is _____.

I HEREBY AGREE TO INDEMNIFY AND SAVE AND HOLD HARMLESS the **RELEASEES** from any loss, liability, damage, or cost (including attorney's fees) they may incur due to use of _____ by the undersigned for the purposes of _____.

EACH OF THE UNDERSIGNED expressly acknowledges and agrees that the foregoing release, waiver, and indemnity agreement is intended to be as broad and inclusive as is permitted by law of the State in which it is executed and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

THE UNDERSIGNED HAS READ, UNDERSTANDS AND VOLUNTARILY SIGNS THE RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT, and further agrees that no oral representations, statements or inducements apart from the foregoing written agreement have been made and I have the authority to Execute this Agreement and EXECUTE THIS RELEASE for the parties and FULLY INTENDING all TO BE BOUND BY SAME.

Signature of Undersigned

Print Name of Undersigned

Date

Signature of Facility Representative

Print Name of Facility Representative.

Date _____