

Risk Monitor



Understanding Waivers of Subrogation

Suppose an air conditioning contractor, while installing a system for a new industrial building, has an accident. Another contractor's employee on the job site suffers injuries when the AC contractor's scaffolding collapses and falls on top of him. The injured worker sues the AC contractor and the project owner. The project's contract included a requirement that the contractor assume the owner's liability for any accidents arising out of the contractor's work. Consequently, the contractor's general liability insurance company pays the injured worker for both the contractor and owner's shares of the damages. The insurance company, however, has determined that the owner was twenty percent responsible for the accident. It files a claim with the owner demanding some of its money back.

The insurance company's action is entirely legal. Many project owners and general contractors, wanting to avoid this situation, insist that their subcontractors agree to a waiver of subrogation.

Subrogation is a legal principle in which a person who has paid another's expenses or debt assumes the other's rights to recover from the person responsible for the expenses or debt. For example, if someone hits your car in a parking lot and causes significant damage, your insurance company will pay you for the damage (assuming you bought collision insurance,) then recover the amount of its payment (subrogate) from the other driver (or, more commonly, from the driver's insurance company.) Subrogation holds ultimately responsible the person who should pay for the damage.

Owners and general contractors want to transfer their liability to subcontractors, to the extent that they can. Therefore, contracts often include a waiver of subrogation agreement. In such an agreement, the subcontractor promises not to pursue recovery from the other party. That agreement might bind the subcontractor's insurance company, depending on the type of policy and its terms.

A standard commercial general liability policy forbids the policyholder from doing anything to impair the insurance company's rights after the loss occurs. This implies that a waiver of subrogation agreed to before a loss binds the company. Also, the sub's policy may protect the other party if it names him as an additional insured. Under common law, an insurance company may not subrogate against its own insured. To remove any doubt, the sub should ask the company to add an endorsement applying a waiver of subrogation to the person or organization named in it. Insurance companies vary on the amount of premium they charge for this; some make no charge at all.

The standard business auto insurance policy has language similar to the general liability policy. Unlike GL insurance, there is no standard waiver of subrogation endorsement for auto insurance. Some insurance companies may offer their own versions of such an endorsement. Again, premium charges will vary.

Workers' compensation policies require an endorsement whenever a waiver of subrogation is desired. This endorsement may apply on a blanket basis to all parties with whom the insured has written contracts requiring waivers. Alternatively, it can apply only to the party listed on its schedule. The insurance company may charge up to two percent of the policy premium for blanket coverage or two to five percent of the project's premium for individual coverage.

Commercial property and inland marine insurance policies vary as to whether they permit waivers of subrogation even before a loss.

In all cases, a contractor or building tenant who is required by contract to provide such a waiver should check the relevant insurance policies. Policy changes should be requested if it is unclear whether they permit pre-loss waivers. The firm should consult with an insurance agent on all insurance-related contractual matters to ensure that the proper coverage is in place.

The "Stimulus Package" that was recently passed and signed by President Obama has implications for group health plans. We have attached two important links to documents to help you with the COBRA aspects of this legislation.

One item is an invitation to an upcoming COBRA seminar to be held here in Indianapolis, on March 19th.

The other document has additional information about the COBRA seminar and addresses the key points of the COBRA provisions contained in the Stimulus Package.

As a reminder, our benefit resource center at TOBIAS CLIENT COMMUNITY is available to you 24 hours 7 days a week. Simply log onto <http://tobias.clientcommunity.com> with your User ID and Password, then click on the Resource area and then click on the Research area of the drop down box to search for your topic of interest.

If you have trouble logging in or have questions on today's or prior Client Community communications, please contact Danielle Laboe at 317-844-7759 or dlaboe@tobias.com for your Tobias Client Community support.

TOBIAS
INSURANCE GROUP, INC.

Tobias Insurance Group, Inc.
9247 North Meridian Street, Suite 300
P.O. Box 90380
Indianapolis, IN 46290

Phone: (317) 844-7759
Fax: (317) 844-9910
Website: <http://www.tobias.com>



Attitude Adjustment: Change Employee Behavior to Reduce Injuries

Despite common belief, the majority of workplace injuries are not caused by unsafe conditions, but rather employee behavior. These “misbehaving” workers often overestimate their physical limits and make unsafe choices—such as lifting a 300-pound piece of equipment without assistance.

When DuPont conducted a study of all its workplace accidents over a 10-year period, they discovered that 96% of the incidents resulted from employees working beyond their limits. A 2006 Liberty Mutual Workplace Safety Study showed that more than 50% of all workplace injuries were a result of overexertion, falls, twisting the wrong way and other such “behavioral” accidents. These injuries led to an estimated \$46 billion in annual worker’s compensation costs.

The OSHA factor

Considering these eye-opening statistics, it’s obvious that workers need an on-the-job attitude adjustment. Some believe the industry should turn to The Occupational Safety & Health Administration (OSHA) to reverse this disturbing trend. Unfortunately, OSHA may not be the solution.

Although the organization has acted as the watchdog for workplace safety for the past 30 years, OSHA generally focuses on making the workplace safer as opposed to changing employee behavior. After all, it’s a lot easier to modify a facility or repair a piece of machinery than it is to change the way a worker thinks and acts. Plus, many employers are wary of opening their doors to OSHA in fear that the organization will become overly involved in their every day affairs.

Taking charge

Because OSHA doesn’t seem to be the answer, it looks like employers are on their own when it comes to changing employee behavior. That means business owners must take the initiative to educate employees and cut down on preventable workplace injuries.

Here are a few steps employers can take to cut back on “behavioral” accidents:

- **Appraise the situation:** Take a closer look at past employee injuries that have occurred in your workplace. If you notice any patterns or trends, it’s time to make significant changes in that area. For example, if most injuries occurred when employees were attempting to carry heavy boxes, focus on teaching workers to safely move boxes with the assistance of another worker or a forklift.
- **Get supervisors on board:** Ensure that your front line supervisors make injury prevention a top priority. Not only should

they constantly enforce safety guidelines, but they also need to raise awareness throughout the ranks.

- **Work as a team:** Workplace injury prevention requires plenty of teamwork. Make sure that all your employees understand the importance of working together and keeping an eye out for their fellow workers.
- **Create incentive programs:** Consider offering your workers special rewards for sustaining a safe workplace. For example, let workers know that if there are no injuries within a 6- or 12-month period, they’ll be rewarded with a party, gift certificates or even an extra vacation day. This will give them greater incentive to make safe choices on a daily basis.

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- **Hire the right people:** Try to employ safety-conscious, reliable workers who are genuinely concerned with injury prevention.
- **Train your workers:** Without the proper education and training, workers cannot be expected to perform their jobs safely. Ensure that all your employees are well-trained in safety guidelines and offer refresher courses each year.

Changing human behavior is no easy task. It will take loads of time and hard work to change your employees’ ways, but it will be well worth the effort in the long run. If you can successfully adjust your workers’ attitudes, you’ll enjoy lower insurance premiums, more productive workers and fewer injury-related absences.

You may even be eligible for inclusion in OSHA’s Safety and Health Achievement Recognition Program (SHARP). This program recognizes small businesses with an exemplary safety and health management system. If you receive this prominent recognition, your worksite will be exempt from programmed inspections as long as your SHARP certification is valid.

New Building Codes Can Leave You Under-Insured



The owner of a commercial building may believe that replacement cost insurance coverage on the building is sufficient to protect her from financial loss. After all, she took the insurance agent's advice and bought enough insurance to pay for repairing or replacing the building if it were completely destroyed. However, this may be a false sense of security, particularly if the building is an older one. While the building may not have changed greatly over the years, local building codes undoubtedly have. Even codes in effect at the time the building was constructed may affect your insurance coverage.

Many local governments have ordinances that require the demolition of a building when more than 50 percent of the building has been damaged. These ordinances require the reconstruction of the building in accordance with current building codes. Zoning and land use codes may have changed over the years prohibiting the reconstruction of that type of building at the same site. This could require the owner to rebuild somewhere else or with a much different building design. Laws and codes requiring buildings to be easily accessible to handicapped people may affect rebuilding if the building previously lacked ramps, doors that can be opened remotely, wheelchair-accessible toilets, and other accommodations.

All of these requirements may significantly increase the cost of rebuilding. Unfortunately, standard commercial property insurance policies provide very little coverage for these higher costs. Most will pay either 5 percent of the amount of insurance on the building or \$10,000, whichever is less, for the increased cost of construction resulting from a local ordinance or law. Therefore, the amount of insurance available for a building insured for \$150,000 is \$7,500; the amount available for a building insured for \$500,000 is \$10,000. The costs of demolition and rebuilding up to new codes or at a new location can quickly use up this relatively small amount.

Building owners should consider buying additional insurance to cover this possibility. Many insurance companies offer ordinance or law coverage for an additional premium. This coverage will pay for the additional costs of demolition and construction unless the costs result from failure to comply with previous ordinances or from the release of pollutants. Included are three distinct coverages for the specified building:

- **Coverage A** - Loss to the undamaged portion of the building
- **Coverage B** - Cost of demolishing the undamaged portion of the building
- **Coverage C** - Increased cost of construction or repairs to comply with ordinances or laws

The amount of insurance available under Coverage A equals the amount of insurance covering the entire building. Separate amounts apply to Coverages B and C. There is no coverage if the damage results from a cause that the policy excludes. For example, most policies do not cover flood damage, so the policy will not pay if the law requires the owner to demolish the building after a flood. Also, the insurance will pay only the amount necessary to meet the minimum requirements. The insurance will not pay for the cost of exceeding requirements during rebuilding.

This insurance covers the owner only for the cost of repairing or replacing the building, not for income lost during additional reconstruction time. Separate coverage is available for this exposure.

An insurance agent can advise building owners on the types, amounts, and costs of coverage they may need to meet updated codes. Whether or not they ultimately decide they need the coverage, they should give it careful consideration. The last thing any owner wants is a surprise uninsured expense after a disaster.

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- Employees should be trained to immediately report unsafe conditions to their supervisor.

Designate a safety leader

OSHA also recommends that employers designate a "competent person," who can continually enforce safety rules. This competent leader should be responsible for the following tasks:

- Daily inspection of the trench, nearby areas and protective systems. The worker should look for any evidence of potential cave-ins, protective system failures or any other hazardous conditions.
- Inspection of the excavation site after every rainstorm or other occurrence that could increase the odds of a hazardous situation.

- Immediate removal of workers from the trench if any hazardous conditions exist.
- Provide safe walkways where workers can cross over the excavation.
- Protect workers from potential cave-ins by providing a protective system designed in accordance with OSHA regulations. (This may include support, sloping and benching or shield systems).

Without the proper safety procedures in place, an excavation site can easily become a death trap for workers. Protect your workers with a comprehensive set of safety regulations. You should also train your workers on these safety protocols and constantly reinforce these regulations. Although it may require some extra time and effort on your part, a strict safety system will definitely pay off for you and your workers.

Keeping It Safe in the Trenches

There's no question that working in the trenches can be a bit risky at times. However, every excavation jobsite doesn't have to be a danger zone. With the proper safety guidelines in place, you can ensure that your workers remain secure and enjoy a safe working environment.

Make the rules crystal clear

The Occupational Safety & Health Administration (OSHA) offers explicit rules for excavation work. If you follow these regulations to the tee and constantly enforce the rules with your employees, you'll be confident that your workers will stay safe in the trenches:

- Before allowing workers to enter the trenches, you must clear all surface hazards and move the spoil pile back two feet.
- You must locate and protect, support or remove all underground utilities and other hazards before workers enter the trench.
- You must provide a safe means of entry and exit from excavations that are more than four feet deep.
- If you suspect hazardous atmospheres may exist in the site, you must test for these conditions. If hazardous atmospheres

are detected, you should eliminate them before workers enter the trench.

- If your team is working in an excavation site more than four feet deep with the potential for hazardous conditions, you must provide emergency rescue equipment. Depending on the particular jobsite, this emergency equipment might include a breathing apparatus, a safety harness and line and a basket stretcher.
- You must provide adequate protection for workers in a trench where water could accumulate or where loose rocks or soil could fall or roll from the excavation face.
- Your workers must be trained to know when to leave an excavation and how to respond to an emergency.
- Employees must know how to properly use all provided equipment and protective gear.
- All workers must maintain safe work practices at all times.



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TOBIAS

INSURANCE GROUP, INC.

9247 North Meridian Street, Suite 300
P.O. Box 90380
Indianapolis, IN 46290

Phone: (317) 844-7759

Fax: (317) 844-9910

Website: <http://www.tobias.com>

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