

BNC Insurance & Risk Advisors: Briefing November 2013 Proper Risk Transfer - Your Best Defense

ATTENTION GENERAL CONTRACTORS

Please take just a few minutes of your time to read this very important Briefing

Why is Risk Transfer more important now than it's ever been? - We've all heard about this killer beast called New York Labor Law. An antiquated law that has spiraled out of control in recent years, wreaking havoc on the NY Construction Industry. It's a no-win for both contractors and insurance companies alike. But a major win-win for attorneys.

With insurance claims and awards at an all time high, insurance pricing continues to be on the rise with no end in sight (very sharply in many instances). Carrier's are limiting and warranting coverage, increasing deductibles, and adding onerous conditions and exclusions to their policies. Risk Transfer is your most important weapon to proactively defend against potential Labor Law claims and protect the future viability and profitability of what is probably your largest asset, your business.

It is important to not only understand the basics of proper Risk Transfer, but to also implement and hold yourself and your staff accountable to strictly adhering to a proper Risk Transfer procedure. Always...all the time...no exceptions. Improper Risk Transfer can and will at some point in time drastically (and easily) damage your bottom line profitability.

So what is this "Risk Transfer" thing all about? - In a nutshell, you as the General Contractor (or even a subcontractor that hires its own subs from time to time) are at risk each and every time your subcontractor and his/her employees step onto your jobsite. Whether there is an injury or property damage as a result of your subs work, you as the GC are always brought in. With NY Labor Law 240/241, you as the GC can be held to strict and "Absolute" liability. It's not a question of what's fair and typically not a question of who appears to be negligent. "Absolute" liability as part of the NY Labor Law, is just that....a law.

Here is where proper Risk Transfer comes in to play. In the event a claim arises, you always want to be indemnified and defended by your subcontractors insurance carrier.....not your own insurance carrier. You want to "Transfer the Risk" back downstream to your subcontractor and their insurance policies.

If your subs insurance policy doesn't defend and indemnify you in the event of a claim caused in whole or in part by your sub, you will have to look to your own insurance carrier for coverage. This may seem like an easy fallback and an excuse for not holding yourself and your staff accountable for proper risk transfer, but the consequences can greatly affect your bottom line. If your subs don't have proper coverage in place to accept the transfer of risk, you may find yourself having to swallow very large separate deductibles, or worse yet, your own policy may contain an exclusion when your subs insurance is inadequate. Imagine having to defend a Labor Law lawsuit on your own, where defense costs can be in the hundreds of thousands and verdicts in the millions. In the end, one thing is for sure, your insurance rates will have the potential to skyrocket. That's if you're still in business after having to pay for your own defense and the potential award to the claimant. We're not talking about premiums increasing a few percentage points or a few thousand dollars. We've seen GL premiums that were very competitive at \$100,000 because of low claims frequency, wind up at \$250,000 upon renewal (or non-renewal) and that doesn't take the massive umbrella premium increases that will occur as well.

Here's a few real life scenarios that affected GC's insurance premiums due to their own carrier having to defend and indemnify claims that should have been passed back down to the subs insurance. As you can see, improper risk transfer had devastating affects to their insurance premium and bottom line.

Policy Type	Premium Prior to Claim	Renewal Premium	Increase
General Liability	\$104,000	\$242,000	+ 133%
Excess Liability/Umbrella	\$38,000	\$135,000	+ 255%
General Liability	\$347,000	\$568,000	+ 64%
Excess Liability/Umbrella	\$145,000	\$378,000	+ 160%
General Liability	\$67,000	\$164,000	+ 145%
Excess Liability/Umbrella	\$26,000	\$94,000	+ 261%

So what are you doing about it? You always get certificates from all of your subs that indicate you are an additional insured. You always have your subs sign a contract. And if you are a step ahead of the curve, your contract has a Hold Harmless & Indemnification provision in it as well as insurance requirements that your subs must comply with.

“But I already do these things so I have nothing to worry about. Right?” Wrong! - First, let me point out to those General Contractors that aren’t obtaining Certificates of Insurance and getting signed Hold Harmless & Indemnification Agreements from each and every sub, you are walking on a very thin tight rope that is fraying any time a sub steps on your job site. It is a matter of time (and almost a guarantee) that you will eventually fall victim to the killer beast, NY Labor Law. You simply have no means of transferring risk back to the sub in the event a subs employee is injured on the job site and decides to sue you (which is typically inevitable).

For those of you that are obtaining Certificates of Insurance and getting signed Hold Harmless & Indemnification Agreements from each and every sub, you could very well be walking on that same fraying tight rope as the GC’s in the previous paragraph. Oh, and please don’t tell me you’re the GC that may have subs working on a jobsite with expired certificates because you don’t obtain renewal certificates when a subs insurance renews, but instead, your solution is that you simply won’t pay them until they submit a new updated certificate. If so, you’re simply lucky, otherwise you would have changed your procedures. We had a client recently that followed this same “hold back their money and pray there are no claims” procedure. Unfortunately, when the claim occurred and they submitted the subs insurance certificate to us so we may notify the subs carrier, coverage had just expired. We asked them to obtain an updated certificate, and you guessed it, the sub was non-renewed by their carrier and had not yet replaced coverage. They had a lapse. Sure, the GC held back roughly \$45,000 that was due to the sub, but their own carrier is now defending (with a \$50,000 deductible due to a sub with inadequate coverage) and their loss runs will show a fairly substantial claim that will most certainly impact their future insurance costs.

There’s a difference between Risk Transfer and proper Risk Transfer. - Here’s just a quick example: You hire a painting contractor. He provides you with a Certificate of Insurance. It says you are Additional Insured. They signed your Hold Harmless Agreement which included Insurance Requirements the sub must meet. The Agreement also requires that the sub name you as additional insured. The subs employee is on a ladder painting some trim. The ladder slips and the subs employee is injured. You get sued by the subs employee. You notify your sub and tell him to pass the suit along to his carrier so they can defend you. You then get a letter from the subs carrier advising you they have denied defense and any subsequent indemnification. They cite the reason as an exclusion the sub has in his policy for “Injury to employees, subcontractors or their employees”. (your basic “Labor Law” exclusion)

Here’s the same example with a little change in the detail. The same painting contractor provided you with a Certificate of Insurance, and it turns out his insurance carrier does not have any exclusions for injury to employees. But the claim still gets denied by the subs carrier. Why? Because in this instance, you forgot to obtain a signed Hold Harmless & Indemnification Agreement that includes wording requiring your sub to include you as Additional Insured. Claim denied! To obtain additional insured status, one of several criteria that typically must be met is that there needs to be a written contract or agreement in place that requires you to be additional insured.

Here are several reasons we see a subs insurance carrier denying tender of a claim:

- Exclusion for injury to employees (“Labor Law” exclusion)
- Contractual Liability exclusion (Hold Harmless Agreements become worthless)
- Height exclusion (excludes work your sub may do above a certain height)
- NYC exclusion (excludes all work in the 5 boroughs of NYC)
- Residential Exclusion or Restriction (may exclude condos, co-ops, homes, ground up work, etc...)
- Additional Insured coverage excludes completed operations (no coverage for the additional insured once the work has been completed by the sub and put to its intended use). So if your sub installed a

deck and three months later there is an injury due to the construction of that deck, there is no additional insured coverage for the GC unless the subs policy included completed operations coverage for the additional insured's.

The list goes on. Transferring risk downstream to your subs insurance carrier is a necessity. Not only does it help prevent potential devastating legal costs in the event your own policy does not respond, but it also protects your own insurance program and loss history, which in the long run keeps you competitive by keeping your insurance costs down. It makes you a more favorable client or prospective client to the ever-diminishing number of insurance carriers still insuring GC's in NY. In fact, many carriers are now mandating that their GC clients have a formalized risk transfer program protocol in place that not only requires certificates and hold harmless agreements, but that also vets and reviews the subs coverage for the many exclusions and limitations outlined in this briefing.

So how can I possibly know if my subs insurance is adequate for proper Risk Transfer? - There is no easy or painless way for a GC to implement "proper" Risk Transfer by themselves. As mentioned previously, obtaining certificates and signed Hold Harmless Agreements is not proper Risk Transfer. It's merely a single piece of the "proper" Risk Transfer puzzle, but neglects some of the most important parts, such as vetting the subs insurance to make sure coverage is adequate and there are no exclusions or restrictions that would preclude risk transfer. You simply can't get this information from a certificate of insurance.

You could hire a risk manager to obtain policies from all of your subs and review them. This could be very costly and extremely time consuming, and without precise protocols, could be an expensive nightmare.

Solution - As this is such an underserved risk management practice and the insurance marketplace is heading in a direction that puts the onus on the GC to comply with "proper" Risk Transfer protocol (which is next to impossible for the typical GC to implement) or suffer potentially devastating consequences, we at BNC have developed a high level on-line Risk Transfer and Certificate Tracking protocol service ([BNC Subshield](#)) that not only vets certificates of insurance and obtains renewal certificates, but it identifies those subs with inadequate insurance, provides the sub with a list of deficiencies and gives them the opportunity to comply. Reports are then forwarded to our GC client. In the end it comes down to what we spoke about in the first section of this briefing. The GC must be accountable and adhere to strict "proper" Risk Transfer protocols. Even if it means kicking a sub off a job until they obtain proper coverage. Subs are contractually required to provide certain insurance coverage's. Why should they have the privilege of working while breaching that contract and putting you at risk?

In closing, carriers are non-renewing insured's for lack of "proper" Risk Transfer, including hiring subs that are insured by carriers with inadequate coverage's and onerous exclusions. Carriers are becoming more diligent in their efforts to only insure best-in-class contractors and are now looking at the list of carriers your subs are using by reviewing the subs certificates of insurance at the time of audit. If there are carriers known to have certain exclusions in their policies and you are hiring subs insured by these carriers, you are at risk of losing your coverage and/or facing major rate increases at renewal. Risk Transfer is not something to be taken lightly. It is a powerful tool to help protect your business and your competitive edge. If done properly, it can and will one day save you from potential disaster. BNC has developed a product and service to formalize and tighten up the Risk Transfer procedures of our GC clients. If you are serious about protecting your bottom line, you need to have "proper" Risk Transfer procedures in place. BNC stands ready to review your current Risk Transfer procedures and make recommendations to help protect your most important asset...your business.

Sincerely,

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