

TECHNICAL INFORMATION PAPER SERIES: EQUIPMENT RENTAL BUSINESS CONTRACTS



REDUCE YOUR RISK THROUGH CAREFULLY WRITTEN AND REVIEWED EQUIPMENT RENTAL CONTRACTS.



A legal contract can have important financial and insurance consequences for your business. However, while contracts can be an effective way to manage risk, you should never enter into any agreements without the advice of an attorney.

Written contracts are preferred.

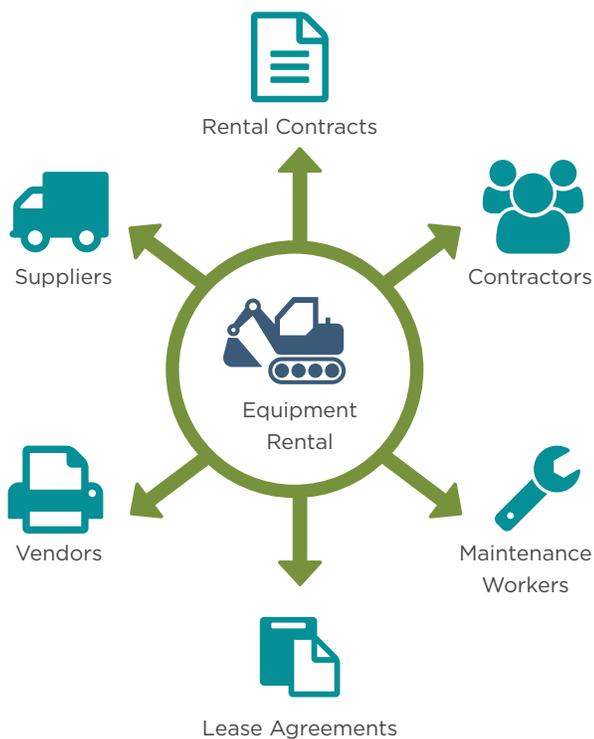
Contracts may be written or oral, but insurance policies often contain provisions that require or only consider written agreements. For example, insurance provisions may not provide additional coverage unless a written agreement requires such coverage.

LEARN HOW TO PROTECT YOUR BUSINESS FROM FINANCIAL FALLOUT

- Get to know what risk transfer is and how it works
- Know what to include in your rental contract and understand what it means
- Understand where your rental contract fits into your risk management plan
- Establish a rental contract management program

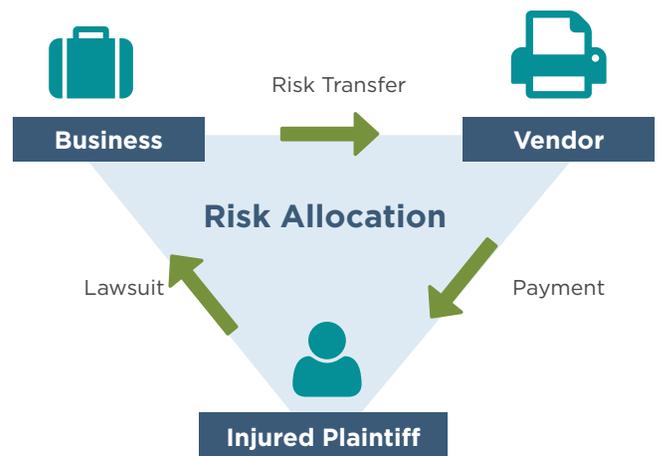
KEY COMPONENTS OF AN EQUIPMENT RENTAL BUSINESS

- Equipment rental
- Contractors
- Maintenance workers
- Lease agreements
- Vendors
- Suppliers
- Rental contracts



USING A RENTAL CONTRACT TO TRANSFER RISK

Risk transfer is a risk management technique used to allocate the risk of certain financial losses between contracting parties. The graph below illustrates the risk allocation among a business, vendor and an injured plaintiff in the event of a lawsuit.



UNDERSTAND THE TERMS OUTLINED IN YOUR CONTRACT

As you review your contracts, it's important to understand these terms:

- **Indemnification and hold harmless** refers to the promise by one party in a contract to defend and cover the other party from lawsuits and losses.
- **Insurance requirements** must be evaluated for all contractors/vendors for workers' compensation, general liability and automobile (or other relevant errors & omissions coverage). The contracts should also specifically state the required limits.
- **Certificates of Insurance (COI)** are intended to be evidence of insurance, not an insurance contract. The document should include relevant information, such as the named insured, policy number, policy terms, limit, and coverage by line of business. Watch for nonstandard forms and wording. Also, consider requiring a copy of the declarations page of the other party's policy, and proof of additional insured coverage.

- **Additional insured** refers to a person or organization not automatically included as an insured under the insurance policy, but who the named insured desires or is required to provide a certain degree of protection under its insurance policy.
- **Primary insurance clause** contains wording that can ensure that one policy will respond primary over another policy. And any contract requiring additional insured coverage should also require that such coverage be primary and non-contributory.
- **Separation of insureds provision or severability of interest endorsement** ensures that claims by one insured against another are treated as if separate policies had been issued to each insured. This could be an issue when more than one additional insured is being defended under a single policy of insurance.
- **Waiver of subrogation** occurs when the insurer pays the insured for a loss and then takes over the insured's right to collect damages from the other party responsible for the loss. In all cases, the right of subrogation may be waived prior to the occurrence or accident. This could be a significant form of protection if there's a waiver of claim in the contract and a waiver of subrogation endorsement in the other party's insurance policy.
- **Cancellation provisions** are included in all contracts. While it's often difficult to keep track of all other policies, make sure that the information provided to you is accurate and current.
- **Named insured coverage** could trigger coverage for ancillary events neither intended nor contemplated. Regardless of your status, you should resist all requests to add another named insured coverage onto your insurance policy.

IDENTIFY AND ALIGN YOUR RISK MANAGEMENT GOALS

Before you negotiate an agreement, you need an approach to risk management that includes an understanding of your risks and the areas of your business it affects. If rented equipment malfunctions, it can lead to litigation and, ultimately,

the loss to your business. Risks can include:

- An injury to your employee
- Bodily injury to your customers
- Damage to equipment while in operation

Lawsuits against your operation usually point to a lack of proper instruction or training. Provide employees and customers with equipment manuals and training on how to safely handle equipment.

LESSONS LEARNED FROM AN ACTUAL CLAIMS SCENARIO

The insured rented out a 26-foot JLG scissor lift to an electrician. The electrician and his helper used the scissor lift on a job to re-string electrical wire between two utility poles. The electrician began to lower the lift as the helper leaned down to put away his tools. The lift tilted over and the helper was thrown 10 feet to the ground.

- **Investigation summary and liability analysis.** It's not entirely clear why the lift fell. The slope of the surface wasn't enough to cause the tip-over. Most likely, there were only three of the four wheels in contact with the ground and as the weight was shifted, the lift tipped. Both men admitted they never looked for an operator's manual, although there was a manual in the basket in a waterproof container.
- **Damages claimed.** Both men sustained significant orthopedic injuries. The electrician also sustained a closed-head injury.
- **Workers' compensation lien.** \$494,000. Not final.
- **Potential for contribution/subrogation.** The case settled for \$650,000, split between each defendant, with the equipment manufacturer and the equipment rental company each paying \$325,000.
- **Lessons learned**
 - » Certify that only authorized and qualified individuals who have fulfilled the requirements set forth by OSHA regulations and ANSI/SIA standards for operator training will operate equipment. Operators must possess current operator cards for both aerial work platforms and tele-handlers.

- » Offer hydraulic jacks (depending on the work site, these are optional).
- » Make sure operator is aware of the tilt light/ alarm feature.
- » Recommend that all persons in the platform wear a full-body harness with a lanyard attached to an authorized lanyard anchorage point while operating the machine.

KEEP YOUR CUSTOMERS WELL-INFORMED

Equipment rental companies should always use a written delivery checklist with customers. The customer should acknowledge the following in writing:

- Ensure that the current ANSI/SIA Manual of Responsibilities for dealers, owners, users, operators, lessors, lessees and brokers of vehicle-mounted elevating and rotating aerial devices is in the manual storage box attached to the equipment.
- Keep the Operators, Safety and Maintenance Manual in a manual storage box.
- Store the AEM Handbook and AEM Aerial Platform Safety Manual for operating and maintenance personnel in a manual storage box.
- Make sure capacity decals are in place, secure and legible, at both platform and ground stations.
- Check that all safety and instructional decals are properly installed, secure and legible.
- Prior to releasing the equipment, the customer should be required to defend, indemnify and hold harmless the rental equipment company through an indemnification provision in the rental agreement. This indemnification generally includes the recovery of attorney’s fees and court costs incurred in defending a claim.
- The rental agreement calls for the rental customer’s insurance policies to be effective before the work begins.
- The rental customer’s insurance policies must have minimum limits of at least \$1 million and include specified limits for each type of coverage.
- The customer should be required to provide the

rental equipment company an additional insured status on a primary/non-contributory basis. The rental equipment company should be named as an additional insured, by endorsement to the policy. (You should request a copy of the endorsement as evidence of coverage.)

REVIEW YOUR CONTRACTS *BEFORE* THE NEGOTIATION BEGINS

Reviewing your contract should begin long before you reach the negotiating table. You should have a clear vision of your risk management objectives in mind. This will allow you to make decisions that:

- Are cost effective
- Balance expenditures for risk financing with those for risk control
- Support the proper allocation of funds among an organization’s risk management activities and its general operations

DEVELOP A PROCESS TO EFFECTIVELY MANAGE YOUR CONTRACT

In order to develop contracts that help your business effectively manage risk, there are several steps you should take. You’ll first want to develop a team and formal process for reviewing, drafting and signing of all contracts that you send out and receive.

- Evaluate your business needs and outline what you expect in the contracts you send out as well as the contracts you receive. Establish your baseline “wants” and any “red flags” that would cause you to walk away up front.
- Create a contract management process with names of those individuals authorized to sign contracts. Ensure that those individuals are well trained on your risk transfer goals.
- Centralize a unit where the contracts can be routed through and retained for the future.
- Make sure that a legal representative reviews all contracts before signing on an annual basis.
- Define a similar process for the issuance or reception of any insurance certificates as a result of contractual obligations.

MAKE YOUR CONTRACT SPECIFIC, ACCURATE AND THOROUGH

- **State the obvious.** Include names and addresses of all parties involved.
- **Be specific.** Describe the work specifically, particularly if the work is being done off-site. You'll also need to address change orders, completed operations and defective work claims.
- **Review all the terms and conditions of the agreement.** Agreements that are incomplete or not executed in a timely manner often lead to problems. Be sure to include every aspect of the work, even if it seems inconsequential.
- **Specify the choice of law.** Generally, parties should specify which state's law applies to their contract. In the event of a claim, this will help a court interpret the agreement consistent with the intent of the parties.
- **Include any other documents.** The contract should include all of the agreements as part of the document rather than referencing any other documents.
- **Disclose indemnification requirements.** Who's indemnifying who, and for what?

- **Disclose attorney's fees.** When a party is entitled to covering another party, it's generally entitled to recover attorney's fees incurred in defending a claim. These fees may be significant.
- **Spell out the insurance requirements.** Who's required to provide insurance; what type; and for what limits (e.g., primary or non-contributory).

There's no substitute for proper planning.

Deals that are negotiated hastily, or with incomplete information, often work to the detriment of the party least capable of handling them. Sometimes, when you're unable to negotiate a fair and equitable deal for both parties, it makes sense to walk away.

That's why establishing a walk-away position is critical. The financial health of your business is too important to leave to chance.

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