

RISK MANAGEMENT MANUAL AND  
GUIDELINES TO MANAGING  
CONTRACTUAL RISK  
UPDATES

The background is a solid blue color. On the right side, there are several white, parallel diagonal lines that create a sense of movement and depth, extending from the top right towards the bottom left.

# RISK MANAGEMENT MANUAL

## STATE VEHICLE USE

### ➤ **Distracted Driving**

- Risk Management guidelines recommend that agencies implement policies to address distracted driving, which includes prohibiting employees from using cell phones, including “hands free,” while operating a vehicle on State business.

# RISK MANAGEMENT MANUAL

## STATE VEHICLE USE

### ➤ Medical Marijuana

- ❖ The operation of a motor vehicle while under the influence of drugs, alcohol or prescription medication must be prohibited. Due to the lack of standardization, Risk Management guidelines are that agencies prohibit any employee from operating a motor vehicle for a minimum period of at least twenty-four hours following the "medical use" of "marijuana" as those terms are used in [N.D.C.C. ch. 19-24.1](#).

# RISK MANAGEMENT MANUAL LITIGATION HOLD

## ➤ Updated Language Stressing:

- ❖ Electronic data that is available on backup tapes must be preserved
- ❖ Meta data on electronic documents must be preserved
- ❖ Employment grievances or charges of discrimination - reasonably foreseeable litigation – triggering duty to preserve

# RISK MANAGEMENT MANUAL LITIGATION HOLD

## ➤ Updated Language Stressing:

- ❖ Issuing Litigation Hold Memorandum is NOT sufficient
- ❖ Verification that materials have been and are being preserved

# RISK MANAGEMENT MANUAL

## USE OF WAIVERS OF LIABILITY

- **Special Events Waivers of Liability, Indemnification, and Medical Releases**
- When State facilities are used by the general public for special events that are not put on and controlled by the State and which present a higher than normal potential for injury, participants should be required to execute a Waiver of Liability, Indemnification, and Medical Release. See examples of recommended *Waiver forms* at [www.nd.gov/omb/agency/risk-management-services/loss-control](http://www.nd.gov/omb/agency/risk-management-services/loss-control).

# RISK MANAGEMENT MANUAL

## USE OF WAIVERS OF LIABILITY

- Waivers may also be a process that can be part of an agency's facilities use agreement. In some cases where the insurance coverage is not required, but there remains some risk of harm, the outside organization and the State agency should secure waivers from each participant releasing the State from liability. **Where the activity is simply a service put on and controlled by the State agency, an Assumption of Risk Form may be used if the activity presents some risk of injury. A Waiver of Liability form is generally not appropriate when the activity is a service provided and controlled by the State agency.**

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Certificates of Insurance:

- ❖ Contractually specify if, when and how updated certificates will be provided
  - Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. An updated, current certificate of insurance shall be provided in the event of any change to a policy. **(Lower Risk)**



# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Certificates of Insurance:

- ❖ Contractually specify if, when and how updated certificates will be provided
  - Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **(Higher Risk)**

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Certificates of Insurance:

- ❖ Contractually specify if, when and how updated certificates will be provided
  - Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. ***Optional Provision:*** An updated, current certificate of insurance shall be provided in the event of any change to a policy. **(Mixed)**

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Certificates of Insurance:

- ❖ Contractually specify if, when and how updated certificates will be provided
  - Tailor requirements to different stages of contract
    - ✓ Installation or construction phase
    - ✓ Maintenance phase

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Certificates of Insurance:

- ❖ Contractually specify if, when and how updated certificates will be provided
  - Evaluate who is your vendor or contractor
    - ✓ Large established vendor versus unknown entity
    - ✓ Personal Service Contracts – sole proprietorship

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Simplified Contract Language:

### ❖ Commercial General Liability Insurance

- Modern policies typically do not have separate “per person” limits
- Separation of insureds (cross liability) is a standard feature of most CGL policies
- Additional insured coverage is primary under most standard CGL policies - past confusion has been eliminated

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Simplified Contract Language:

### ❖ Commercial General Liability Insurance

- Self-Insured retention (SIR), if used, ordinarily a large established entity
- Safe to assume that most vendors and contractors have standard coverage and policy terms when there is a lower risk of third-party claims. Large entities generally can meet any SIR and trigger additional insured coverage.

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Simplified Contract Language:

### ❖ Commercial General Liability Insurance

- Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of ~~\$250,000 per person and~~ \$1,000,000 per occurrence.
- ~~a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;~~

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Simplified Contract Language:

### ❖ Commercial General Liability Insurance

- ~~cross liability/severability of interest for all policies and endorsements;~~
- ~~The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;~~
- ~~The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.~~



# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Simplified Contract Language:

### ❖ Professional Liability Insurance

- Most policies are written on a claims made basis.
- Limitations inherent in a claims made coverage form can be addressed through an extended reporting period- "tail coverage"

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Simplified Contract Language:

### ❖ Professional Liability Insurance

- “Professional errors and omissions with minimum limits of \$1,000,000 per ~~occurrence~~ claim and in the aggregate, Contractor shall continuously maintain such coverage during the contract period and for three years thereafter. In the event of a change or cancellation of coverage, Contractor shall purchase an extended reporting period to meet the time periods required in this section.”

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Updated Risk Management Analysis Matrix:

- ❖ Clarify that On-Site versus Off-Site is not determinative or the only factor that needs to be considered. It is an inquiry that can assist in identifying the actual risks that need to be considered and possibly addressed; e.g. damage to state owned property, injury to members of the public.
- ❖ The Matrix and corresponding template language is not a substitute for proper analysis and identification of the specific risks that arise under a contract and tailoring the contract language to meet the identified risks.

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Leases:

- ❖ Must require the Lessor (Landlord) to maintain property insurance on the building.
- ❖ Under North Dakota law, it is presumed that a tenant is an implied co-insured on the Landlord's property insurance. But this assumed allocation of risk can be modified by contract.
- ❖ As an implied co-insured, insurance carrier cannot subrogate against a tenant for the loss to the Landlord's property.

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Leases:

- ❖ Most standard policies also allow for a waiver of rights (waiver of subrogation) if executed before the loss.
- ❖ Expressly require a waiver on property that is required to be insured.
- ❖ “Property insurance insuring the full and true value of all Lessor’s real property and personal property located on or in the building in which the leased premises are located for all losses. **Lessor waives any right to seek compensation from State for any covered losses for which this required insurance is to apply.**”

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Leases:

### ❖ Mutual Waiver Requests for Insured Property – addressed by Fire and Tornado

- I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US
- If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party **in writing with our consent.**

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Facility Use Agreements:

- ❖ Facility use agreements involve the use of grounds/facilities by non-state employees, outside groups, private activities.
- ❖ State owned facilities and grounds should be open for use by the public if the contemplated use is not inconsistent with the primary purpose of the facility.

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Facility Use Agreements:

- ❖ Requires a risk analysis. Obligation to protect state property and ensure reasonable safety. Who controls the risk?
- ❖ Requirements must reasonably address risk without discouraging or creating obstacles to public use.



# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Facility Use Agreements

### ❖ Purpose of Indemnity/Insurance Requirements

- Purpose is to address derivative liability and damage to public property, and make those organizations, entities, or persons that are at fault responsible and able to meet their obligations.
- Addresses risks that are not under the direction and control of properly trained and authorized state employees.
- Furthers the policy of allowing State facilities to be used by the public.

# GUIDELINES TO MANAGING CONTRACTUAL RISK

## ➤ Facility Use Agreements

### ❖ Facilities Intended for Public Use – Parks, Trails, Wellness Centers

- Facilities that are designed to be used as a public benefit or service do not require facility use agreements unless there are additional activities/risks involved beyond the primary intended use of the facility - Alcohol, food, events open to public.
- Individual Waiver to use facilities or grounds as intended or to receive publicly provided benefit, service , or opportunity is generally NOT appropriate. Providing notice of the risks or assumption of risk form may be warranted in some circumstances.

Questions?

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