



RISK NOTE

SUBJECT: Insurance and Risk Management in Lease Agreements

Poor drafting of language in a lease agreement can lead to ambiguity and confusion between landlords and tenants which is particularly troublesome should a claim occur. Because the landlord usually provides the lease agreement when the Health Care Agency (HCA) is the tenant, the HCA should negotiate with the landlord to arrive at language that ensures a fair and enforceable transfer of risk between the parties and avoids potential liability and insurance issues.

The lease agreement should be reviewed prior to signing. There are multiple sections in a lease which are related to and will have an impact on risk and insurance. The purpose of this Risk Note is to assist the HCA in understanding the clauses and how they will affect risk and insurance where the HCA is the tenant. Each party should arrange its own program of insurance, avoiding duplication.

Landlord's Insurance

A landlord should be required to provide insurance on the building and its fixtures (all risk property) and commercial general liability to protect the landlord against loss arising from their own negligence. This requirement should be stated in the lease.

The cost of the landlord's insurance will usually be flowed through to the tenant as a portion of the operating costs, included in the rent. If this is the case, it is a requirement of the Health Care Protection Program (HCPP) that the insurance **MUST** contain a waiver of subrogation in favour of the HCA. This means the landlord's building insurance will pay for damage, if any, caused by the HCA. This is reasonable because the HCA has paid for that insurance.

If a lease makes the HCA responsible for insuring the building on behalf of the landlord and the HCA is unable to negotiate otherwise, the HCA should contact HCPP for further advice. HCPP does not provide coverage for the landlord's benefit and the HCA will usually have to arrange commercial insurance through the private insurance markets.

Published by the Health Care Protection Program

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Tenant's Insurance

The tenant should provide insurance on its property (contents in the building) including tenant's improvements and commercial general liability to protect the tenant against loss arising from its own negligence. You may find a requirement that this insurance contain a waiver of subrogation in favour of the landlord. Such a waiver is not reasonable because the landlord has not contributed to the cost of the tenant's insurance. We would recommend that the HCA, as tenant, not routinely accept a waiver of subrogation or waive its rights of recovery against the landlord. If this is done, the HCA and/or HCPP will be unable to recover from the landlord if the landlord negligently causes damage to the HCA's property.

The tenant may also be required to provide insurance on plate glass and/or boilers and machinery. If this type of property is within the control of the HCA, this is reasonable and can be covered by HCPP.

Note that the HCPP provides all risk property insurance and commercial liability insurance that meets the terms of most commercial leases. If you have any doubt about the ability of HCPP to meet the insurance requirements of a specific lease, please refer to HCPP.

We recommend that the lease include the following language to acknowledge HCPP as the Tenant's coverage provider:

"Notwithstanding anything contained in this paragraph, the landlord acknowledges that the tenant is insured for all risk property insurance and commercial general liability insurance as a regional health authority under the provisions of the Health Care Protection Program and the landlord confirms that the tenant is deemed to be in compliance with the provisions of this paragraph provided that the tenant remains insured under the Health Care Protection Program throughout the term."

Landlord as Additional Insured

It is common practice for a landlord to be included as additional insured under the tenant's insurance policy. This provides the landlord with protection against liability arising from their ownership, use or operation of the leased property as long as it arises as a result of negligence on the part of the tenant. A landlord may be added as additional insured to HCPP liability coverage; however, a landlord may not be added as additional named insured.

Subrogation Waivers

Subrogation gives an insurer the right to recover their insurance payouts from negligent parties, in the name of their insured. Waivers of subrogation deny insurers this right.

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The HCPP will not agree to waive its rights of subrogation. If pressed to do so, HCAs should contact HCPP for advice.

Indemnity Provisions

Under an indemnity provision, one party agrees to reimburse another party for certain types of loss. An indemnity can be narrow, only encompassing bodily injury or property damage arising from one party's negligent acts or omission; or it can be broad, encompassing all loss irrespective of how caused. For this reason it is important to review the indemnity provisions carefully to ensure that the desired objectives are met.

The *Financial Administration Act* contains a requirement that all government corporations, which includes the health authorities, must have indemnities they grant approved by the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance. HCPP can make recommendations on the approvability of such indemnities and facilitate the approval process on your behalf.

Release

Parties to a contract have certain rights. A release from one party means the party agrees to forfeit a right it may have otherwise had. For example, the landlord may seek to be released from liability for death or injury of any nature whatsoever that may be sustained by the tenant or employees, agents or customers of the tenant arising from any occurrence in, upon, at or relating to the leased premises. Furthermore, the landlord may ask to be released for any damage or damages caused by explosion, fire, theft, breakage, failure of sprinkler, drainage or plumbing systems, or removal of snow, rain or ice, or by steam, gas, water, rain, snow or other substances leaking, and so on. We recommend that you accept this only with the insertion of the words "except to the extent caused or contributed to by the negligence of the landlord or those for whom the landlord is responsible in law or for which the landlord is insured or required to provide insurance pursuant to this agreement". This ensures the landlord retains responsibility for those risks within its control.

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