



RISK NOTE

SUBJECT: Waivers, Limitations of Liability and Indemnification Clauses in Contracts

Health Care Agencies (HCAs) are often involved in contractual relationships with other parties. Either party may attempt to transfer risk through terms in a contract such as a waiver of liability, a limitation of liability and/or an indemnification or hold harmless clause. This risk note discusses the effect of these clauses and how to ensure that the risks are being fairly apportioned.

A waiver of liability occurs when one party agrees to give up (or “waive”) a claim, right or privilege which it would otherwise have had. A commonly requested waiver occurs in information technology contracts where an HCA may waive its right to sue for indirect damages (e.g. costs associated with restoration of data such as re-compilation of information and overtime for data entry). In another example a contractor may seek to have the HCA waive its rights to sue the contractor for failure to properly perform the contracted services (e.g. an elevator maintenance contractor fails to properly maintain the elevator and someone suffers an injury or damages as a result).

HCAs should ensure that it does not agree to waive its rights against the other party to a contract without a careful understanding of the implications of that waiver. Usually it is appropriate for each party to a contract to be responsible for its actions and retain liability for damages arising directly from its own negligence. HCPP recommends caution before agreeing to waive its rights to hold another liable for its actions under a contract. Prior to agreeing to waive any rights, the HCA should undertake a risk assessment considering the benefits of the contract and the cost of assuming the risks. The HCA should contact its organization’s risk manager or chief risk officer to discuss.

A limitation of liability, unlike a waiver, does not fully release the other party from liability but instead limits the degree to which they can be held responsible. A limitation of liability clause may apportion the potential liability between the parties or limit the dollar amount for which the other party can be held liable. Often another party will seek to limit its liability to the value of the contract it is entering into. The HCA should ensure limitations of liability are reasonable and take into account the full potential for loss or damage to the HCA. In most cases it would not be appropriate for another party to limit financial losses arising from bodily injury or death. If in doubt, the HCA should contact its organization’s risk manager or chief risk officer to discuss.

Indemnity and hold harmless clauses are other forms of risk transfer. An indemnity or hold harmless clause in a contract obliges one party to indemnify (or reimburse) the other for specified costs associated with the contract. A typical indemnity or hold harmless clause may include a duty to defend the other party in the event of litigation.

For example, in the case of the elevator maintenance contract, the HCA may be asked to indemnify and hold the elevator company harmless for all losses that the elevator company may incur arising from the operation of the elevator. The HCA should not agree to indemnify the elevator company for losses associated with claims resulting from improper maintenance of the elevator. It would be reasonable for the HCA to expect the elevator company to indemnify the HCA.

The HCA should always be cautious with indemnities or hold harmless agreements and determine how reasonable the clauses are. The type of contract often determines the appropriateness of the indemnity or hold harmless clause. HCPP recommends the HCA require independent contractors to indemnify the HCA for any losses due to the contractor's acts or omissions. Contact your risk manager or chief risk officer to discuss this issue.

The BC *Financial Administration Act* requires that all government corporations (which include health authorities) must have indemnities they intend to grant approved by either the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance. HCPP is able to facilitate the indemnification approval process if a copy of the final contract is forwarded to HCPP before it is executed.

A less common option would be for a HCA to have its indemnity process pre-approved. Please contact HCPP for further details.

November 2007

Published by the Health Care Protection Program

It should be clearly understood that this document and the information contained within is not legal advice and is provided for guidance from a risk management perspective only. It is not intended as a comprehensive or exhaustive review of the law and readers are advised to seek independent legal advice where appropriate. If you have any questions about the content of this Risk Note please contact your organization's risk manager or chief risk officer to discuss.