

# Reducing School Cost of Risk Through Risk Transfer

By

Marty Malloy, CSRM, MS, Arm-P, CPCU

One of the most efficient methods for a school district to handle risk is to transfer the risk of an exposure to another party. There is generally no cost to the school district in transferring risk, but the reduction in a district's total cost of risk can be substantial.

There are two primary areas where risk can be transferred: workers compensation and general liability. This article will examine common workers compensation and general liability exposures and methods to transfer the risk of these exposures to others. It will also discuss best practices for transferring these exposures. It will then discuss some statutory methods which give a school district immunity from liability which negates the need to transfer those exposures. Finally, it will talk about best practices when a district is asked by another party to transfer risk to the district.

This article is not meant to be a comprehensive guide to risk transfer. When implementing a risk transfer program you should work with your attorney and insurance professional. Every school district's risk profile and risk tolerance is different. Your insurance professional can help you determine those parameters. The transfer of risk often involves contracts which you should have reviewed by legal counsel.

## Workers Compensation

Common workers compensation exposures:

- Employee use of weight rooms and other school facilities for wellness activities
- Independent contractors
- Sports officials

Most schools allow employees to use school facilities to help employees maintain health and wellness. It is important that the school district have an employee sign an acknowledgement that use of the facilities is voluntary and not a requirement of any work sponsored wellness program. Some employees have received workers compensation for injuries sustained in employer provided wellness facilities. The employees claimed they were working out at their place of employment as part of an employer sponsored wellness program. A properly executed waiver and/or acknowledgement should prevent this type of claim.

The Wisconsin workers compensation statute has a nine point test that defines who is an independent contractor in Wisconsin and who is an employee. If a party does not meet all nine points they are considered your employee under the workers compensation statute. This means that if they are injured while working for you, their claim will be covered by the district's workers compensation program. Their payroll can also be added to the district's workers compensation policy. One way to assure that an independent contractor does not affect the district's insurance is to obtain a Certificate of Insurance showing that the independent contractor has workers compensation insurance. (Certificates of Insurance will be discussed in more detail later in this article.)



The nine points to determine independent contractor status are:

- Maintain a separate business,
- Obtain a Federal employer identification (FEIN) number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year (a social security number cannot be substituted for a FEIN),
- Operate under specific contracts,
- Be responsible for operating expenses under the contracts,
- Be responsible for satisfactory performance of the work under the contracts,
- Be paid per contract, per job, by commission, or by competitive bid,
- Be subject to profit or loss in performing the work under the contracts,
- Have recurring business liabilities and obligations, and
- Be in a position to succeed or fail depending on business expenses and income.

Sports officials generally do not meet the nine point test. However, your district can protect itself by using the WIAA contract for officials. The August 2013 *Taking Care of Business* has an excellent article by Woody Wiedenhoef discussing this contract and its approval by the Wisconsin Department of Workforce Development.

**Common Liability Exposures:**

- Parties performing a service for the school district
- Parties using school district facilities

When your school district hires third parties to provide services, the risks involved in performing those services should remain with that third party. This can be done through indemnity and hold harmless agreements in favor of the school district from the third party. An emerging risk management practice is to ask your vendors to run background checks on their employees. Part of your agreement with your vendors should state that your vendor will not allow any employee with a criminal history that is substantially related to children and/or a school be allowed to work on your school district grounds.

Outside groups commonly use school facilities. Your district should have a facility use agreement that spells out the responsibilities of outside groups that use your facilities. This agreement should also have indemnity and hold harmless clauses in favor of the school district.

**Certificates of Insurance**

Once a risk is transferred, the school district needs to make sure the transferring party has insurance to cover the risks that have been transferred. Always obtain a Certificate of Insurance from all vendors or parties that use school facilities or grounds. This certificate should show proof of worker compensation and liability insurance. It is also important that these parties add the school district as an additional insured on the vendor's liability insurance policies. The district should also always ask for a copy of the endorsement to the liability policy that adds the school district to the policy. There are dozens of different additional insured endorsements.



It is very important that the endorsement match the type of activity covered by the Certificate of Insurance. If the two do not match, there is a possibility that the school district will not receive coverage from that policy. For example, an additional insured endorsement for “lessors of leased equipment” would not provide coverage for a special event held on school property by an outside group.

### **Statutory Protections**

As a public entity, the state of Wisconsin provides you with liability protections. Under Wisconsin statute, your district has limited liability for “actions founded in tort” in state courts. Under the recreational immunity statute, school districts have immunity for recreational use of school grounds. The recently passed “Open Gym Act” grants this immunity to the use of indoor facilities for community health and recreation. There are some important differences between recreational immunity and the immunity provided by the “Open Gym Act”. The “Open Gym Act” requires specific postings and signatures from parties using your facilities. The WASB website ([www.wasb.org](http://www.wasb.org)) in the Insurance Plan section has some excellent examples of these documents. Your insurance provider and attorney should have examples as well. Finally, the “Open Gym Act” does not apply to swimming pools, weight rooms and gymnastic equipment. (Please note: These limits and immunities are not absolute. There are some exceptions. You should check with legal counsel regarding these exceptions.)

### **Caution: Don’t Transfer Your Insurance Limits Away**

Your school district will also be asked to add other entities as an additional insured to your liability policies. It is in the district’s best interest not to name an additional insured to its policy unless that additional insured is another Wisconsin public entity. As discussed previously, your district has liability limitations in the state of Wisconsin. Non-Wisconsin public entities do not have those liability limitations under state statute. When you add them to your policy they have access to your entire policy limits. Your district has purchased its insurance limits based on the fact that you enjoy statutory liability limitations. An additional insured could easily use up your limits leaving no available limits to pay for a claim from the district.

### **Conclusion**

Your district can transfer risk to others and reduce your overall cost of risk. However, you need to work with your insurance professional and counsel to make sure you are properly transferring risks. Also, WASBO CSRM courses have extensive information on risk transfer and other methods to reduce the cost of risk for your district.

## **About M3**

M3 Insurance offers insight, advice and strategies to help clients manage risk, purchase insurance and provide employee benefits. We are committed to being experts in both the products we represent and the industries we serve. Our people advance M3’s competitive advantage in the marketplace, and our focus on community builds better places live and work. M3 is consistently ranked a top 100 broker in America.

