

Oregon Municipal Handbook

CHAPTER 15: RISK MANAGEMENT AND INSURANCE



Chapter 15: Risk Management and Insurance

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The LOC sincerely thanks Scott for his work on this chapter.

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Chapter 15: Risk Management and Insurance

Cities have unique risk management and insurance needs that differ from other entities. Understanding the various types of risks, best practices and insurance options is essential to responsible city governance.

I. RISK MANAGEMENT

A. What is Risk?

Risk: The impact of uncertainty on achieving objectives. An impact is a deviation from the expected outcome—positive or negative.

Many think of “risk” as anything that **threatens** to meeting objectives. But risk can also be **opportunities** that help achieve objectives.

Risk Assessment: The process of risk identification, risk analysis, and risk evaluation.

Risk Appetite: Level of risk a city is willing to accept based on the expected reward.

Risk Tolerance: Measure of the level of risk a city is willing to accept. Risk can be assumed, avoided, reduced, or transferred.

- **Assume the risk.** Perhaps this is a risk we elect to live with—or that is unavoidable. For example, if a city decides to have a skateboard park, there will be some level of associated risk.
- **Avoid the risk.** In the example of the skateboard park, the city could elect to avoid the risk altogether by simply not having the facility.
- **Reduce the risk.** This often involves “loss control” and safety measures. The risk of a skateboard park can be reduced substantially by means such as ensuring proper design and construction, rules of use, and not charging a fee for use (in order to preserve “recreational use” immunity).
- **Transfer the risk.** Risk can be either partially or wholly transferred to others. This can be done, for example, through an indemnity agreement, where one party (“indemnitor”) agrees to defend and pay on behalf of (“indemnify”) the other party (“indemnitee”) in the event a claim is asserted by a third party against the indemnitee. But the most common method of risk transfer is through insurance or pooling.

B. Risk Management Best Practices

City management would be wise to implement some risk management best practices.

1. Appoint a Risk Management Coordinator who is trained on risk management techniques and own risk management duties.
2. Have a current Employee Handbook which has been approved by a labor attorney. Provide regular training on hiring practices, harassment training, and employment laws.
3. Implement a city-wide Safety Manual and assign safety responsibilities.
4. Implement a Fleet Program in which driver's license records are checked and employees trained in defensive driving.
5. Review all ordinances, resolutions, and policies on a regular basis.
6. Have an Emergency Plan and practice the plan annually.
7. Have a legal and insurance review of all contracts.
8. Use a local insurance agent to provide insurance, risk management, and loss control advice.
9. Maintain an up-to-date schedule of all properties and vehicles.
10. Implement internal financial controls.
11. Carefully consider all possible unexpected outcomes in new activities.
12. Don't go it alone. The LOC, CIS, your local agent, and others are happy to provide advice on how to reduce the uncertainty in managing a city.

C. Risk Management Duties

Cities should clearly assign risk management duties, so ownership of risk is clear. The following list of risk management duties will be helpful in assigning ownership. Citycounty Insurance Services (CIS) can help!

RISK MANAGEMENT DUTIES - CITY

Risk Management Administration

Responsibility

Employee

Risk Management Policy & Procedures

CIS Best Practices Survey

RM Budget

Cost Allocation

Special Events

Maintain Insurance Schedules (Property & Auto)

Deductible and Limits Decisions _____

Contract Administration

Insurance & Indemnity in Contracts _____

Certificate of Insurance Management _____

Risk Management Policies

Vehicle Use Policy _____

Policy Review and Maintenance or Practical Drift _____

Risk Related Policies: (review & approve)

- Sidewalk
- Snow removal
- Weed Control
- Club Activities
- Cross walks
- Youth & Senior Centers
- Youth & Senior Activities
- Foreign Travel
- Food Services
- Health Clinics
- Waivers
- School to work programs
- Red Flag & Oregon Consumer Protection Act
- Record Management & IT Security
- Financial Controls
- Pursuit

Volunteer Policy & Management _____

Risk Identification in Construction Projects _____

Workplace Violence Policy/Team _____

Environmental Compliance _____

Facility Use Agreements _____

Incident & Claims Tracking & Reporting

Incident Tracking & Reporting _____

Auto Claims Management: _____

General Liability claims _____

Claims Review _____

Workers' Compensation

Training & Employee Consultation _____

801 completion and reporting _____

Communications with adjustor _____

Return to Work _____

EAIP Funds _____
Leave Management _____
OSHA 300 Log _____

Safety

Safety Coordinator _____
Safety Policy _____
Safety Committee Management _____
Employee Orientation on Policy _____
Air & Noise Monitoring _____
Hearing Conservation _____
First Aid & CPR Training _____
Posting of Labor Notices _____
Fire Extinguishers _____
Hazardous Communication Program _____
Lockout/Tagout Program _____
Respirator Protection _____
Personal Protective Equipment _____
Inspections _____
General Office Safety _____
Equipment Use _____
Confined Spaces _____
Fall Protection _____
Emergency Response _____
Bloodborne Pathogens _____
Forklift _____
Fire Drills _____
Fire extinguisher inspections _____
Playground Inspections _____
Asbestos Policy & Management _____
Ergonomics _____
Driving Training _____
Bleacher & Grandstand Inspections _____
Back Safety _____
Ladder Safety _____
Welding _____
Utility Locates _____

Emergency Management

Emergency Management Policy _____
Emergency Management Exercises _____
Business Continuity Planning _____
Pandemic Management _____

Security Management

Key cards management _____

Security training _____

Security contractors _____

II. INSURANCE

For most individuals and businesses, insurance has been the accepted method for transferring risk to another party (the insurance company) in exchange for payment of insurance premiums. In the 1970’s, due to the legal environment at the time, combined with other “market forces” affecting insurance companies it became increasingly expensive for public bodies to find insurance coverage, especially liability insurance—if indeed they could find it at all. In response, public bodies all over the country began to explore alternatives, including the idea of “pooling” their resources to either collectively “self-insure” their risk exposures or attempt to purchase insurance as a group, thereby exercising more purchasing clout. Self-insurance pools began to emerge.

Though born of necessity, the idea of “pooling” public entity risk has proven to be both popular and successful. In 1981, the LOC and Association of Oregon Counties (AOC) agreed to form a trust, known as City County Insurance Services (CIS), that would not only act as a pool to collectively “self-insure” or purchase insurance at group rates, but would also provide risk management services to its members.

CIS is governed by a Board of Trustees consisting of elected or appointed city and county officials. All cities and counties in Oregon, and many affiliated public entities, are eligible to become members of CIS provided they are also members of LOC or AOC. CIS currently provides either pooled self-insurance coverage or group purchase insurance for liability, property, vehicle and equipment physical damage, workers’ compensation, boiler and machinery, crime, and employee benefits. When coverage is provided under a pooling arrangement, the document describing the coverage, and any exclusions, conditions, etc. is referred to as a “coverage agreement” rather than an insurance policy. For more information about CIS, see www.cisoregon.org.

I. Loss Control

As noted above, one of the important risk management tools is “loss control.” Loss control training, various risk management publications, and visits by loss control representatives all help avoid or minimize potential losses by highlighting areas of concern. In some cities, employees with risk management responsibilities may also be available to help. If your city is a member of CIS you have a designated Risk Management Consultant to assist with risk management. CIS also

provides its members with “pre-loss” legal assistance (especially useful in employment matters) and other resources, including risk management grants.

Oregon state law requires all public entities to have a safety committee. Safety committees must be trained in responsibilities including performing quarterly inspections on all facilities.

Losses can be controlled by following a number of practices. For example, improving personnel practices reduces claims for wrongful termination, sexual harassment, discrimination, and other employment-related matters. A thorough review of city contracts, including intergovernmental agreements and mutual aid agreements, will help avoid common contract liability exposures when working with other individuals or organizations. In addition, there are many preventative measures cities can take, classified under the broad title of ergonomics, to reduce or avoid repetitive-work injuries. Driver training, preventive maintenance, and internal controls to reduce the likelihood of embezzlement are just a few other examples of areas that can be addressed.

In addition to the direct costs of losses (whether the actual cost of the loss, or the cost of insurance premiums or self-insurance pool contributions), there are other reasons to control losses. Frequent accidents and injuries reduce employee morale. Poor personnel policies affect employee performance. And frequent claims against a city may reflect poorly on its management and even impact council members at election time.

Elected officials and management should provide staff with clear safety expectations and hold staff accountable when safety rules are not adhered to.

II. Workers’ Compensation

Generally, cities must pay workers’ compensation benefits to their employees for all injuries or diseases arising out of, and in the course of, their city employment. The law is designed to ensure the quick and efficient delivery of benefits to injured workers. This coverage is typically obtained through the purchase of insurance or participation in a self-insurance program, such as CIS. Some larger cities elect to “self-insure” this exposure.

Self-insurance should only be undertaken with the advice and recommendation of an actuary, and with proper preparations in place, including provisions for claims administration, return to work assistance, and properly funded claims reserves. Because of the potential magnitude of a claim, the LOC strongly recommends that almost all cities purchase insurance. One of the advantages to maintaining workers compensation is that it is the “exclusive remedy” available to injured workers, meaning they cannot sue the city for damages even if the injury was the result of the city’s negligence.

A. Volunteers

Municipal volunteer personnel, and elected officials or officials appointed for a regular term of office, such as members of boards and commissions, are not considered to be employees of a city and, thus, are not covered by the Workers' Compensation Act unless a city passes a resolution extending coverage to these individuals. When such coverage is extended by resolution, the city is required to maintain separate official membership rosters for each category of volunteers.¹

B. Inmate Workers

Cities and counties may also elect to have inmates performing authorized employment (including workers performing court-ordered community service work) covered for workers' compensation. Again, the city would be required to maintain a roster of such inmates or community service workers.²

C. Contractors

It is important that any contractor doing business with the city provide evidence of compliance with the statutes that require employers to have workers' compensation insurance. This could be achieved by showing the contractor has insurance, showing that he or she does not have employees and thus is not an employer, or by showing that he or she is self-insured. Although the workers' compensation laws do not create any liability on the city's part for providing workers' compensation benefits for the employees of contractors who do not have coverage, there are ways the city might be required to pay workers' compensation benefits to these uncovered employees.

A court could determine the contractor was really a subcontractor and the city was a general contractor, and therefore, is liable for providing workers' compensation benefits to the subcontractor's employees. Or an independent contractor, who is a sole proprietor with no employees, might be found to meet the criteria of an "employee," and be entitled to benefits. When dealing with independent contractors who are sole proprietors, the city must be extremely careful to make sure the person meets the criteria of an independent contractor or purchases workers' compensation coverage. An employee cannot waive the right to be covered by the Workers' Compensation Act.

III. Property Coverage

The risk of loss to city property includes loss of or damage to buildings, contents, mobile equipment, and motor vehicle due to perils such as fire, wind, theft, vandalism, earthquake and

¹ ORS 656.031.

² ORS 656.041.

flood. The “catastrophic” perils of earthquake and flood are typically treated separately by underwriters and may be covered on separate policies or coverage agreements and may be subject to separate coverage limits and/or deductibles.

Property coverage should provide broad in scope and should be easy for the city to administer and should minimize the potential for errors that result in inadvertent gaps in coverage. To best protect the city, coverage should, to the extent possible, be on a “replacement-cost” basis, meaning there is no deduction for depreciation in the event of a loss.

Cities should also consider “boiler and machinery” or “machinery breakdown” coverage. As the name suggests, this type of coverage can protect the city from losses caused by machinery breakdowns. Standard property-insurance policies typically would not cover that type of loss.

IV. Liability Coverage

As discussed in detail in the preceding chapter, cities face numerous exposures to liability in their everyday activities. Liability coverage is coverage for claims someone else makes against the city, an officer or employee, or another covered party. Such coverage, whether through purchase of commercial insurance policy or participation in a self-insurance pool such as CIS, should be tailored to address the unique liability exposures faced by cities. The cost of defending a lawsuit for damages is normally included in liability coverage.

A lawsuit that demands a city do something (like issue a building permit) rather than pay damages is typically not covered by liability insurance.

A. Who Should be Covered?

Covered parties in a liability policy should include the city and its officers, employees, agents, and volunteers.

B. Types of Coverage to Include.

The following are some types of liability that may be excluded under many conventional insurance policies, but which represent important liability exposures for cities. Cities should make sure their liability coverage includes these risks:

- Libel, slander, defamation, and invasion of privacy arising out of comments made at a public meeting or in the performance of an employee’s duties, especially arising out of the operation of a public-access or city cable TV channel, or a cable broadcast of council meetings.
- Claims that a police officer used unreasonable force.
- Liability for employment actions such as hiring, firing, disciplining, or promoting, including back wages awarded as damages for wrongful termination.

- Liability for claims of sexual or racial harassment.
- Claims for punitive damages to the extent permitted by law.
- Violations of civil rights, including payment of attorney’s fees.
- Claims arising from the failure to supply utilities.
- Liability coverage for fireworks displays, if the city owns, sponsors or operates fireworks displays, or if city employees, such as firefighters, volunteer to set off fireworks.

Excluding certain types of claims from coverage should be a conscious decision and should not be made by purchasing the least expensive policy. Every claim made against a city that is not covered by insurance is a potential loss to the taxpayers. Retaining these risks may save money on premiums, but a better and more predictable way to reduce costs by retaining risk is to use deductibles by which the city retains the financial responsibility for all claims or certain claims up to a certain dollar amount each year. The city can always budget for this type of loss.

C. Intergovernmental Entities

Intergovernmental agreements (IGA) are authorized by ORS Chapter 190, which provides in part: “A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform.”³ The statute goes on to provide that the actual performance of such intergovernmental functions or activities may be carried out in one or more of several listed ways, such as by jointly providing for administrative officers.

One of the listed options is to create a new and separate “intergovernmental entity.”⁴ When such an entity is created the liability exposures associated with that entity must be considered. If the agreement does address the issue of liability, then each participating entity is “jointly and severally” responsible for any debts, liabilities, and obligations of the intergovernmental entity (meaning any one or more of the entities may be held responsible, either individually or collectively). As an alternative, one of the participating entities may assume that responsibility, thereby eliminating the “joint and several” liability.⁵ The recommended “best practice” from a risk management perspective is to either have one of the parties expressly assume that responsibility (and be sure it is covered under their insurance or coverage agreement), or obtain separate coverage for that intergovernmental entity.

³ ORS 190.010.

⁴ ORS 190.010(5).

⁵ ORS 190.080(4).

D. Amounts of Coverage

Claims against Oregon public entities and their employees are subject to statutory “caps” on damages under the Oregon Tort Claims Act. However, as noted these caps may be found unconstitutional in certain cases. In addition, these caps do not apply at all with respect to “Section 1983” civil rights claims and certain other federal claims, such as Title VII discrimination and Americans with Disabilities Act) (ADA) claims. Accordingly, the statutory tort caps do not mean those amounts would reflect adequate coverage limits for liability coverage. It is recommended that cities and counties carry at least \$5,000,000 per claim, with a \$15,000,000 annual aggregate. The CIS liability coverage program automatically provides those limits to all participating members, with higher limits also available.

V. Automobile Insurance

The liability of the city and its employees for the operation of motor vehicles in the course and scope of city business is, of course, an important liability exposure that must be covered. Conventional insurance policies typically cover this “auto liability” under a policy separate from the general liability policy. The CIS coverage agreement does not distinguish the two and covers auto liability, along with the city’s other covered liability exposures, under a single Liability Coverage Agreement. This also includes Uninsured/Underinsured Motorist coverage as required by law.

VI. Contractual Liability

This is NOT a coverage for damages awarded against the city for breach of contract. Instead, it covers certain “indemnity” obligations that are assumed by contract. A typical example is where the city might enter into a contract to lease a building from a private party (“Lessor”). Lessor would likely want a provision (“indemnity clause”) in the lease agreement providing that if Lessor gets sued by some third party as a result of City’s negligence in connection with the building occupancy, then city will “defend and indemnify” Lessor.

For example, say the leased building is used as a public works shop. A citizen comes into the shop and is injured when he trips over a hazard on the floor. He sues the City and Lessor/building owner. The tripping hazard was actually related to some alterations the city had done to the building. The liability claim arose out of City’s negligence, but Lessor, as building owner, ends up getting sued. Under the indemnity clause, Lessor can simply “tender” the claim and legal defense to City, and City is obligated under the contract clause to provide the indemnity and legal defense. Insurers typically cover this indemnity obligation. It is referred to as “contractual liability.” CIS covers this exposure by the way it defines “Additional Member” as including this contractual indemnity exposure.

CAVEAT: This coverage is intended to cover agreements to indemnify the other party against claims arising out of the negligence of the city or its employees. It does not apply to claims arising out of the sole negligence of the other party.

VII. Fidelity and Faithful Performance Bonds

Public employee bond coverage is required for certain city positions, but it is a good idea to cover all employees of the city in order to minimize the risk of loss. The Crime Coverage included in the CIS Property Coverage Agreement includes both employee dishonesty (theft, embezzlement, etc.) as to all employees (\$50,000 limit unless excess crime coverage is included) and “faithful performance” as to “any of your officials who are required by law to give bonds for the faithful performance of their duties.”