



Risk Management

by Michael Gentile, J.D.

There are just some liabilities that cannot be delegated to contractors

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It is not uncommon for any business to engage independent contractors to perform a particular service or a special project. Independent contractors are often used in situations where a business does not have the ability or ongoing need to hire the required number or classification of employees for a project or service they need completed. By engaging an independent contractor, also known as “contracting out”, a business can access a pool of resources, including larger numbers of specifically trained workers and specialized equipment, without the ongoing employee cost and debt service required to make these resources part of their organization.

In the hospitality industry, independent contractors are often used for such services as security, parking, catering and food service, and specialized maintenance and cleaning projects. It allows a property to provide additional services to their guests while limiting the cost and responsibility to provide such services.



A word about liability

There is one other significant benefit that comes when a hotel contracts out a service. When an independent contractor is engaged, any liability that may occur when performing the contracted service is generally the responsibility of the contractor that performs the service and not that of the property owner or hotel Management. One of the fundamental treatments of risk in any management plan is to transfer risk; and along with buying insurance, contracting out services is a classic method to transfer risk. But with all things legal, there comes an exception to the general rule that the risk of liability is always transferred to the contractor.

In the case of many hospitality facilities, especially hotels, there are certain risks that cannot be transferred. These are referred to as “non-delegable duties”. This means that no matter who performs the function, the hotel remains responsible for any liability that may result. In other words, hotel Management can delegate responsibility for performing certain tasks and maintenance, but they can never relieve themselves from ultimate responsibility regarding the actions/inactions of the contractors or the quality of their workmanship. Nor can the hotel transfer this ultimate duty of care to someone else.

Typical non-delegable duty scenarios

For hotels, non-delegable duties will often be found in areas that involve the health and safety of the guests or patrons. In these cases, public policy dictates that an employer should not be permitted to avoid liability it would otherwise incur by engaging an independent contractor who improperly performs the agreed upon task. Such a rule is intended to motivate owners and operators of the facility to screen and qualify, as well as monitor, the contractors that they hire, and to see that the work is done properly. Some examples where hotels have been or may be found to be responsible to their guests for negligently performed contracted service are as follows:

- A hotel may be found liable to a guest who slips and falls on a sidewalk that was not properly cleared of ice and snow by a snow removal service.

- A hotel that contracts with a company to provide security on its premises remains liable if a guest is injured in an attack that could have been prevented but for the negligence of the security firm.
- A hotel contracts with an outside cleaning company to provide laundered bed, bath and table linens for its premises or perhaps to perform special cleaning projects such as chandelier cleaning or floor care maintenance and a guest is injured while these projects are being performed or the linens delivered.
- A hotel or restaurant may be liable if a licensed pest control company fails to properly exterminate rodents from the premises and a guest is bitten or infected in some way as a result.
- Finally, if the hotel has an elevator or escalator, the facility will remain responsible for any accident or injury that occurs as a result of a problem that was not discovered or was improperly repaired by an elevator service company.



Recommendations to minimize liability

Notwithstanding the potential to retain legal liability in some of these situations, it will often be advantageous and even necessary to continue to contract for certain services. That being the case, there are certain precautions that Management can take to protect itself from the financial ramifications of the negligence of an independent contractor:

Hire reputable contractors. Engage in the same due diligence that you would in hiring an employee for a responsible position. Ask for references, insurance, bonding and so forth. Failure to do so could expose the facility not only to liability for the actions of a contractor, but also to a claim for negligently hiring that contractor in the first place.

Monitor the work of the contractor and its employees. Watch who is on the job, how the service is supervised, monitor the status of the work and how the work area is regulated and maintained. Ask questions and offer suggestions if needed, but realize that if Management becomes too involved, liability for those suggestions could shift back to the facility.

Require insurance from the contractor. In certain situations check to see if the facility can be added as an insured on the contractor's policy for a certain service or check to see if the contractor can be named as an insured on the facility's policy. While this will not eliminate an injury from occurring, it will provide the financial backing of a liability insurance policy to pay claims and legal defense.

Use indemnification and hold harmless agreements. When a facility contracts with an independent contractor, the contract should include language to the effect that if a third party is injured due to the negligence of the contractor, the contractor will indemnify and hold the hotel harmless from liability for the contractor's negligence. A separate agreement could also be used for this purpose. This will add a layer of protection by having the contractor pledge his insurance coverage or personal assets to reimburse the hotel or hotel management company for claims it must pay. If in doubt, have an attorney review or draft sample language that can be included in most contracts. Also, Todd Seider's article from Volume 15, No. 4 of *The Rooms Chronicle* (see below) explains these concepts in detail.

Contracting out services is a prudent strategy to any business and makes good business sense. But a key component as to what makes a contractor "independent" is there is no control over how the service is performed. In the case of a non-delegable duty for a hotel or restaurant, this may create situations where the facility is responsible for an act over which it had no control other than to select the contractor. For this reason, it is important that Management take steps such as those outlined above to both avoid injury and protect it from the financial risks that may result from the acts of independent contractors.

The Complaint Corner

- Mr. Tired Traveler: (...returning to the hotel front desk...) You just checked me into room 1253 but the key does not work. I keep getting a yellow light on the door.
- Bad Reply: That is unfortunate. Try this key instead, it should work fine.
- Slightly Better: I am sorry that this has occurred. Sometimes the magnetic strip demagnetizes even after one use. Allow me to prepare a new key for you right away.
- Best Reply: Please accept my apologies Mr. Tired Traveler for this inconvenience. I will prepare a new key for you right away and then escort you to the room with a master key to make sure you get into your room.

From the TRC archives

The following related article can be downloaded from the TRC website:

- “Transfer your risk...Don’t get stuck paying for something you didn’t do”. Vol. 15, No. 4. ✧

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