

Legal and HR Services Bulletin

Private Business Use of Public Premises During Pandemic

As members receive requests for businesses to use public property unconventionally for commercial activities, they confront additional premises liability exposure. This exposure can be mitigated by positioning for immunity and incorporating risk transfer requirements into permit applications. The measures in this Bulletin are not required. They are recommended as a method to control losses and coverage costs through sound legal loss prevention. Primex³ liability protection provides members sufficient coverage, with or without these measures.

Discretionary Function Immunity

A policy and plan to allow applications for unconventional use of public premises should be based on an assessment of all supporting and conflicting public policies, such as economics, quality of life, competing uses, laws and local regulations, safety, liability, administrative capacity, etc. The planning process may involve representatives of all departments whose operations would be impacted, most specifically the chief executive, law enforcement, fire and EMS, health code enforcement, planning and zoning, public works, economic development, and others as deemed necessary or helpful. The plan should be reviewed and approved by the public entity's executive officer and/or governing board. To the extent the plan places obligations on public officials and employees, the terms should be clear, reasonably achievable and flexible, wherever possible, because implementing a governmental plan, with some exceptions, is considered ministerial and has to sufficiently align with the plan as approved. Modifications to the plan should follow the same approach.

Sample Risk Transfer Language

- **Liability Insurance**

Permit applicant (name of business) shall provide proof of general liability insurance in the amount of \$1,000,000 per occurrence and \$2,000,000 aggregate, including the Town/City of _____ as an additional insured on a primary and noncontributory basis. The general liability insurance policy shall not exclude claims arising from disease or pandemic, or claims occurring during a state of emergency.

- **Indemnification**

Permit applicant (name of business) shall defend and indemnify the Town/City of _____, its officials, employees and volunteers against all demands, claims, suits and actions seeking damages, penalties, costs, interest, statutory relief and/or equitable relief on account of bodily injury, death, personal injury, property damage and/or economic injury arising out of or related to the permit or the activities of the permit applicant.

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(continued)

General Considerations and Tips

- Permission for use must be obtained from owner public entities
- A permit process works well to document terms and conditions of permission
- Permits should be temporary and freely revocable, with or without cause
- The person signing the permit must be the authorized signatory of the business entity
- Risk transfer provisions are generally a good idea, but in the end are a local policy decision
- The sample provided in this bulletin is commercially reasonable but the limits can be adjusted
- The permit may allow for hardship modifications/waivers if greater flexibility is desired
- The permit applicant should provide satisfactory proof of coverage as a condition precedent
- Proof must indicate the public entity is an additional insured
- Primary and noncontributory additional insured status helps ensure insurance funds will be available
- Proof should indicate liquor liability coverage of the public entity if alcohol will be served
- The policyholder on the proof must align with the business name of the permit applicant
- Coverages expire annually at varying times – monitor and require updated proofs as needed
- Save the permit documentation and proofs of coverage permanently
- Seek the expertise of your attorney and NHMA with any municipal law questions that may arise in developing your approach and policy
- Contact your Primex³ Risk Management representatives for safety questions
- Comply with applicable emergency orders and public health requirements

Please contact **Kate Spillane**, kspillane@nhprimex.org or **Mike Ricker**, mricker@nhprimex.org, if you have any liability or insurance-related questions about this bulletin or if we can be of further assistance.

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