

Employment Agreement – Employed Architects' Liability

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Summary

Employees are responsible for negligence in the performance of their services or work if the negligence results in damage to another individual or corporation.

Background

Architects who are working as employees for holders of Certificates of Practice (CofP) or non-holders may believe that there is no liability for professional services rendered and/or work performed by them. This is not the law. Any employee is responsible for negligence in the performance of his/her services or work if the negligence results in damage to another individual or corporation.

The employee is not responsible for the negligence of co-workers unless part of his/her duty is to supervise and direct the work of co-workers. If this is a duty and that supervision and direction is done negligently resulting in damage to another person or corporation, the supervising employee may be liable for the damage together with the employee whose work was being supervised.

If the employed architect is acting in the course of employment, the law imposes liability on the employer for damages arising out of the employee's negligence. As a result of this "vicarious liability" the employer may be required to pay for the damages caused by the negligent employee, but that does not prevent the employer from pursuing recovery, or attempting to recover, the full amount of the damages paid out, as a result of the employee's negligence, from the negligent employee.

Suggested Procedure

Employee of Holder

The annual practice policy issued by the Pro-Demnity Insurance Company covers members employed by holders participating in the Pro-Demnity Plan as employees of the holder. The definition of "PERSON(S) INDEMNIFIED" includes present or former employees of the holder while acting within the scope of their duties for the holder.

This definition of the words "PERSON(S) INDEMNIFIED" also means that, once the Pro-Demnity Plan has paid a loss in the name of the holder, the Plan cannot subrogate against (or attempt to recover from) the employed member who may have committed the error.

Employee of Holder Exempt From Pro-Demnity Plan or Non-Holders

Members employed by holders that are exempt from the Pro-Demnity Plan should verify with the holder whether they enjoy the same protection. As stated above, members employed by non-holders of a CofP which includes corporations, financial institutions, developers, contractors and various levels of government, may also be held liable to third parties for their errors, omissions or negligent acts. If your employer does not have insurance covering professional liability claims, contact your own legal and insurance advisors for advice on arranging for protection against professional liability claims by both third parties and your own employer.

While it is unusual for an employer to hold its own employees responsible for errors committed within the scope of their duties, such exposure should be addressed and protection arranged.

Where there is insurance coverage, it is arranged on a 'claims made basis' which means that coverage applies where the claim is made and reported during the period of insurance. Accordingly, the insurance must be in force at the time claim is made. As actions for "negligence" may be brought within the period prescribed in the *Limitations Act*, 2002 as amended (see Practice Tip PT.06) and claims may arise years after the project is completed, employed architects should endeavour to monitor the renewal of the professional liability insurance purchased by the employer or ensure the renewal of their own professional liability insurance. While the majority of claims are made within ten years of the date of substantial performance of the project, it is not unknown for a claim to be brought fifteen to twenty years or more following substantial performance.

In consequence of the above, it is recommended that employers be requested to include in the Employment Agreement, the 'Agreement to Save Harmless and Indemnify' in order that the employer undertakes (i) not to claim against the employee; (ii) to pay on the employee's behalf all sums for which the employee becomes liable, before or after termination from employment:

In the alternative, execute a separate agreement dealing with just this issue signed and delivered, dated and witnessed.

Please note that an agreement of this nature is only as good as the ability of the employer to honour it.

Employment Agreement

Agreement to Save Harmless and Indemnify

"The Employer hereby agrees to save harmless and indemnify the Employee, his/her heirs, executors, administrators, successors and assigns against any liability arising out of or in respect of any error, omission or negligent act in the performance by the Employee of professional services as an architect on behalf of the Employer and to pay on the Employee's behalf out of the funds of the Employer all sums which the Employee becomes liable to pay as damages, interests, costs, fees and expenses, as a result of or sustained or incurred in or about any action, suit or proceeding that is brought, commenced or prosecuted against the Employee or the Employer whether before or after the termination of employment and to defend the Employee in any such action, suit or proceeding at the expense of the Employer and to make no claim against the Employee with respect thereto for contribution or indemnity".

This is suggested wording only and is not a substitute for involvement of your own legal counsel. You are advised to discuss specific wording and requirements with your own legal counsel.

Definitions

Employee: one who works for and under the full direction of another individual or entity (employer); a person working either full time or part time for an employer and in a manner that satisfies Revenue Canada Agency's criteria for determining employer-employee relationships.

Vicarious Liability: liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship of the two parties.

The OAA does not provide legal, insurance or accounting advice. Readers are advised to consult their own legal, accounting or insurance representatives to obtain suitable professional advice in those regards.
