

RISK TRANSFER: INDEMNITY, WAIVER, AND INSURANCE

17



17.1 OVERVIEW

In Chapter 2, we identified the five basic phases in the preventive law process. The preceding chapters applied these phases to aspects of education. We focused on identifying, assessing, and evaluating various risks. This chapter zeroes in on a key final aspect of designing a prevention plan, the fourth phase of our preventive law approach. Specifically, this chapter looks at coping with risk by transferring it to the greatest extent practical and feasible.

Risk transfer is a very desirable and often underexplored response for many institutions. The various means for transferring risk include actions to “export” it to others, such as by outsourcing certain services. An institution can also require other parties to agreements, such as those using the institution’s facilities, to purchase liability insurance naming

the institution as an additional insured to protect it as a beneficiary under the other party's insurance policy.

One of the most important ways an institution can manage risks is through the use of agreements specifying which risks are transferred and which are retained. For example, in most commercial leases, the risk of property losses inside the premises is completely borne by the tenant, and property losses outside the premises are completely on the landlord, regardless of fault. Sections 17.2 and 17.3 consider two important aspects of risk-transferring agreements. In Section 17.2 we examine how institutions can use indemnity agreements to shift liability for loss to other parties; we also look at appropriate considerations when the institution takes on liability through agreements to indemnify officers and others within the institution. Institutions also can require participants in certain activities to sign waivers of liability or have parties to contracts hold the institution harmless from liability for losses (Section 17.3).

Purchasing insurance is the most common method of transferring the risk of loss. Section 17.4 details many key considerations in acquiring appropriate insurance policies and submitting and handling claims under them.