Putting Risk Allocation into Practice on Campus

The following steps can be used to establish campus policy and procedures that promote a consistent approach to the task of allocating responsibility for third-party claims between your institution and its contractors.

1. **Address risk allocation in the campus contracting policy.**
   An institution’s contracting policy should include its approach to allocating responsibility for third-party injuries based on its tolerance for taking on risks from activities it may not control. Some institutions transfer as much risk as possible to the other party, while others may change the way risk is allocated depending upon the subject matter or amount of the underlying agreement, or the nature of the activities performed under the agreement. For example, an institution may transfer any risk in its facilities use agreements but decide on a case-by-case basis about contracts with guest lecturers.

   To decide upon a policy, institutions must consider state law, bargaining power relative to the other party, and the potential for financial or reputational loss if the institution is responsible for injuries caused by a contracting party’s negligence. Through this process, an institution should strive to establish the following:

   - **Model indemnity language.** Consult with legal counsel and the risk manager to draft model indemnity language for inclusion into an institution’s written contracts.
   - **A process for considering and approving deviations to an institution’s model indemnity language.** If a contracting party wants to modify the model indemnity language, an institution needs a clearly articulated process for considering and approving any deviations. This process should include review by legal counsel of any suggested changes. If the institution is prohibited by state law from indemnifying contractors for third-party injuries, the contracting policy should clearly state that deviations from the model language are not permitted.

   The expertise of both the institution’s risk manager and legal counsel is useful in this process as well as the input of relevant campus administrators.

2. **Update form agreements.**
   Update any form contracts the institution uses (for example, purchase orders, facilities use, service contracts, and construction contracts) to include the model indemnity language. Also, if the institution uses a contract checklist when reviewing agreements, include the model indemnity provision in the checklist and require that contract reviewers check for that provision in any contract under consideration.

3. **Inform potential contracting parties of insurance requirements.**
   Before a contractor ever bids on a contract or an entity entertains using an institution’s facilities, the institution should establish and clearly state the insurance requirements for the other contracting party. Advance notice of insurance requirements will help to attract contracting parties that can meet the institution’s requirements and prevent later disqualification.

4. **Receive and review the certificate of insurance with the additional insured endorsement prior to signing the contract.**
If an institution intends to handle third-party claims by obtaining coverage under the contracting party’s insurance, then it must obtain and review all documentation about that party’s insurance coverage before it signs the contract. Institutions must allot ample time to evaluate the certificate of insurance and additional insured endorsement as well as the other party’s insurance coverage to make sure they comply with the institution’s requirements and to ensure that the policy provides adequate coverage.

5. **For ongoing or multiyear contractual relationships, confirm insurance requirements annually.**
The contracting party’s insurance coverage may change over time or even expire while your institution continues to do business with that party. Institutions need to review the terms of their insurance contract, the terms of the policies listed in the certificate of insurance, and the terms of the additional insured endorsement every year. When the original agreement, certificate, or endorsement has expired, a new one should be issued as long as the institution continues to do business with the other party.

6. **Have a process for monitoring and storing insurance documents.**
If a claim is brought, the institution has to prove it is covered by the contracting party’s insurance policy. Because neither the contracting party nor its insurance carrier may keep track of the certificates of insurance or additional insured endorsements they issue, it is important that institutions maintain and monitor the status of certificates of insurance, additional insured endorsements, and copies of the relevant policies that it obtains in connection with a contractual relationship. 

7. **Publicize and educate relevant persons about the policy.**
The institution needs to educate any staff or independent contractors who are authorized to negotiate, review, or sign contracts about the institution’s indemnification or risk allocation practice as set out in the campus contracting policy. Methods for educating staff and publicizing the policy can include posting explanations of or instructions about the policy on the institution’s website, conducting training seminars, and publishing articles in various campus communications.

When responsibility is unknowingly assumed for a contracting party’s negligence, an institution may suffer large losses for actions or conditions that are out of its control. The time to consider who will bear the risk of loss for third-party injuries in contractual relationships is before an institution enters into a contract. Through proper contract language, insurance requirements, and a sound policy, institutions can better protect themselves in their contractual relationships.