

# Professional Liability Update



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## A/E Risk Review

### Staffing Decisions Impact Liability Exposures

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

Any signs of economic recovery and growth are welcome to design professionals. After years of struggling to keep staffs fully employed, some firms are now stretched thin and considering bringing on new hires.

The decision to hire new staff in the face of business growth has important liability implications. Hiring full-time employees can be risky when business is improving but still not on a completely solid footing. Beyond having financial constraints on payroll, design firms may find it difficult to locate qualified and experienced staff. Bringing in inexperienced or under-qualified staff can actually worsen the situation. Senior managers can become distracted from their design work as they spend hours training and retraining new hires, some of whom may never succeed. Hiring the wrong person presents innumerable headaches and exposes a firm to myriad potential losses.

But not hiring during a business uptick and – as a result – overworking current staff has its dangers as well. As your professional staff juggles multiple projects and backlogged workloads, details fall through the cracks. Documentation may be missed, observation may be lessened and support staff may be assigned to tasks better left to seasoned veterans. The demands of keeping up with too many projects can lead to critical errors and omissions – along with unwelcome disputes and professional liability claims.

So what's the answer to this dilemma? Obviously, turning down attractive projects due to a lack of qualified staff is not the solution design firms are looking for. Instead, firms should take a proactive approach to locating and potentially hiring qualified professionals. In addition, they should investigate alternative employment options that can help companies keep up with workloads without committing to a long-term increase in full-time headcount.

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## Perpetual Recruiting

Design firms should maintain a consistent recruiting mode whether they are currently hiring or not. This does not mean running nonstop help-wanted notices on the Web, in local newspapers or in industry trade journals. Rather, it means keeping your eyes and ears open to available talent that may add to the quality of your staff.

For example, management should regularly network through professional associations. Word of mouth can often unveil talented design professionals looking for a new challenge or a change of scenery. Brazenly headhunting your competitors' key employees may lead to retaliation, but open eyes and ears can bring existing opportunities to light.

Another low-cost and effective recruiting tool is your company Website and social media accounts such as Linked-In, Facebook and Twitter. Many firms have created extensive "career opportunity" sections on their Websites, with prominent buttons on the home page linking prospects to this section. They provide a succinct description of the company and its culture, and list any positions currently available. A contact e-mail address for inquiries is a must; a mechanism for prospects to submit cover letters, resumes and work samples is even better. Be sure to provide the company address, as well as the names and phone numbers of key contacts so that prospects can make direct calls.

Intern programs continue to be a popular way to bring junior talent into a design firm. But keep in mind that interns are rarely prepared to take a prominent role in a practice and, therefore, are not always an effective solution for alleviating today's heavy workloads.

## Alternatives to Traditional Staffing

A drawback to hiring during times of growing workloads is the potential for layoffs should the economy cool off again. Firms that repeatedly grow and shrink with the economy often suffer decreased morale and lowered performance as employees become distracted by the instability. You may want to look to alternative staffing methods.

**Contract professionals or contingent employees** are becoming prevalent in the design industry. In fact, across all industries, professional and technical workers have been a growing segment of the flexible work force once known as

“temporary employees.” Qualified architects, engineers and other professionals can be hired through national agencies and specialized staffing companies.

Indeed, it’s not just those who can’t find a steady job filling the ranks of contract professionals. This employment option is proving attractive to skilled designers looking for professional challenge, diversity of assignments, travel, and the ability to increase skills for heightened marketability.

The benefits contract workers provide are many. Contract workers allow flexibility with staffing as job skill requirements and project loads fluctuate. They are typically paid hourly and the employment agency often handles administration, payroll taxes and benefits. You may enjoy lower recruiting costs compared to hiring employees. Plus, should an opening become available, a contract professional who likes your company and decides it’s time to set roots may accept your offer to stay on as a full-time employee.

Disadvantages include potential higher turnover and reduced company loyalty – although this is not always the case. What's more, you usually have to pay overtime.

**Independent contractors** are another alternative to permanent staff. These are essentially the same types of workers as contract professionals, but you deal direct with the individual rather than going through an agency. The advantage is that the per-hour cost is generally lower since you don’t pay a fee to an agency. The disadvantage is that you lose the administrative services often provided by agencies.

**Loaned employees** are a less common but growing source of contract workers. With this approach, consulting firms “borrow” employees from another consulting firm to work on a short-term basis in exchange for a fee. This practice is proving effective between design firms with good working relationships. However, there are substantial gray areas here regarding liabilities. For example, if there is a claim arising from a loaned temp employee’s services on a project for the borrowing firm, the lending firm can easily be brought into the suit. Be cautious with this approach and have a qualified attorney draw up the leasing agreement.

**Moonlighting** is the practice of hiring designers who already hold down a permanent job to perform services for your firm during off hours. This practice is fraught with liability dangers for both the hiring company and the other employer. Work can be

substandard as the employee may be working 12 or more hours per day. In the event of errors or omissions, claims can get particularly spiteful.

**Sub consultants** are certainly not new to design firms. Most architects, for example, have experience hiring sub consultants from a variety of engineering disciplines. However, it is becoming more common to find architects sub consulting with other architects, civil engineers sub consulting with other civils, etc., to help handle overflow workloads. Rather than hiring subs to perform functions where a firm lacks expertise, companies are subcontracting work they would typically perform themselves if they had adequate staff.

When considering any alternative staffing method, be sure to check state labor laws regarding what qualifies a worker as an “employee.” Sometimes, the number of hours worked, duration of hire, level of supervision, or scope of work requirements may inadvertently cause an alternative staffer to be qualified as an employee.

## Reducing Liability

What are some of the steps design firms can take to minimize liabilities while addressing staffing shortages?

When seeking to hire an employee, establish strict job criteria to meet your needs. Make sure recruits possess the skills, licenses and other requirements necessary to carry out the functions they will be called upon to perform. Be ready to provide new hires with close supervision, mentoring by senior staff members and ongoing training from effective instructors.

Make sure all of your recruiting, interviewing, hiring and firing policies and procedures are in compliance with the many state and federal laws prohibiting discrimination. A detailed human resource manual and a professional recruiter can go a long way to avoiding potential employment practice liabilities.

## Work Agreements with Alternative Staff

Put your alternative staffing agreements in writing. You can start with one of the professional association forms. (Both EJDC and the AIA have consultant agreements

you and your attorney can likely adapt to your situation.) Or, develop a form of your own. Your goal is to arrive at an agreement that is reasonable and fair and allows each party to reach its objectives.

Here are three critical points you need to address in the work agreement:

1. Draft a clear scope of services that spells out the functions to be performed and the working relationship to be established.
2. Include a fair and insurable indemnity. We suggest a mutual indemnity that gives both parties equal protection. By providing for mutual indemnity based on
3. Comparative fault, the party found most responsible for the error or omission will bear the bulk of the liability. This comparative fault clause only comes into play legally if the claim ultimately is decided in court. However, it can also serve as a valuable guide should a dispute be resolved prior to a lawsuit through mediation or some other dispute resolution technique.
4. Have each party maintain and furnish proof of insurance. Your agreement should require each of you to provide to the other certificates of insurance showing all coverages.

Other issues you will need to address include:

- Who will retain ownership of documents?
- How will you handle payment?
- Will the sub consultant/independent contractor perform construction observation?

If you are the prime consultant, we recommend that you pass through to your sub consultant or independent contractor any liability protections (such as indemnities and limitations of liability) that you are able to obtain from your client. If you loan your employees to (or borrow employees from) other consulting firms, you should have a contract that sets forth who will take responsibility for claims that arise from the employee's services. Probably the best solution is to have the "borrowing" firm assume the responsibility and indemnify the other firm.

## Employment Practice Liability Insurance

As previously mentioned, you must make sure your recruiting, hiring, training, management and firing procedures are in full compliance with state and federal laws and are evenly and consistently applied by all members of management. One false move that could be perceived as discriminatory or as harassment could lead to a long and expensive lawsuit. We can assist you in finding proper coverage with an Employment Practice Liability Insurance (EPLI) policy.

EPLI provides protection against claims made by current employees, former employees, or potential employees. It covers claims based on discrimination (age, gender, race, disability, etc.), wrongful termination, sexual harassment, and other employment-related allegations. EPLI covers your firm and, specifically, your directors and officers.

## Raise Standards, Lower Liabilities

A final consideration for lowering liability is to limit the amount of additional work your firm takes on. This doesn't mean saying no to the next great opportunity that arises. Rather, raise your standards for the types of projects and work you will accept. That could include raising your fees, limiting the types of projects you will accept, or raising the standards you demand in a new client. That way, you can continue to accept the cream-of-the-crop new clients and weed out troublesome ones. Although your total revenues may remain constant or rise more slowly, your profit margins could increase substantially while your exposure to risk is reduced.

### Can We Be of Assistance?

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*

**STUCKEY INSURANCE** is the leading provider of Professional Liability to design professionals in Arizona. Please call us if you like to schedule a consultation for your insurance needs.

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