

Meteorological Spring

For some of us the best day of the year is the “winter solstice.” While it is the shortest day of the year, the upside is that each day thereafter is a little longer. It’s a way to get through the winter with a positive attitude, looking forward continuously to the summer solstice. Then recently we learned of the distinction between the astronomical and meteorological calendars. Astronomical spring begins March 20th, at the vernal equinox, but meteorological spring begins March 1. Yeah!

As this is being written, it’s already Spring by both accounts— March, April and May in meteorological terms, which is based on average temperatures rather than the position of Earth in relation to the Sun. Therefore, it’s time to start thinking about the spring clean-up and maintenance. Before heavy spring rains come, there are some important chores to organize. Starting at the top. In the steeple or bell tower, a very vulnerable part of church architecture.

Steeple and towers are often open permitting them to collect wind driven rain or snow. Check for evidence of water coming in. And be sure it has a way out other than through ceilings and walls. If rot is found anywhere, you have a complicated problem that will only get worse. Prepare to deal with it now. And check for animals nesting, find their way in, and secure it.

Next, the **roof**. Remove debris collecting in valleys. And most importantly, on flat roofs, be sure that all **scuppers** are free of debris and able to flow freely. Check around roof top HVAC units and parapets for evidence of damaged flashings.

Snow and ice may have **loosened gutters**, or leaves and pine needles may have accumulated. These conditions may affect

drainage in several ways. When gutters are loosened away from eaves, water may not be carried away from the roof and may flow down building walls instead, damaging masonry. Water may overflow blocked gutters with the same result. When water is not carried away by downspouts into storm drains, it may accumulate close to foundations and infiltrate basements. Most of the above are maintenance issues, and not covered by insurance.

Now, **steps and pavements**. Surface water, and cycles of freezing and thawing will damage steps, sidewalks and parking surfaces. The plow operator can also cause damage. For your parishioners and guests, especially the elderly, identify pavement heaving and cracks that may result in tripping. Remember, the elderly are the most vulnerable to small differences in pavement due to a shuffling gate, poor vision, and poor balance. It may be time to repaint or install “safety yellow” markings or non-skid tape on steps. If you have a gravel lot, locate the potholes and get new gravel delivered. In general, be sure that all drainage is away from buildings and in the direction you intend.

As the **trees** begin to leaf out, note **dead branches** and have them pruned. They can end up on the neighbor’s property or, worst case, on the neighbor’s car. Be a good neighbor. If you have light poles, examine the bases and fastening. These can rust over time and will always find a car to fall on when they fail.

Do you have a **playground** that has sat idle most of the winter? It’s inspection time. Check for loose fasteners or sharp edges. Remove damaged equipment. Check gates and fence lines and order cushioning material.



By the time you have read this, it’s time to cut the grass in some parts. Take a walk to find **debris** that could be kicked up by the mower, like last fall’s walnuts, or if you are lucky enough to live in Ohio, buckeyes that you can craft into a necklace.

Claims Corner

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Are You Sure He's An Independent Contractor?

One of the more frequent employment questions we get is whether a church can hire a person as an "independent contractor." Unfortunately, more often than not, the conditions do not properly fit the spirit of "independent." Whether a person is an "employee" or "independent contractor" is not an issue of convenience; there are legal, insurance and tax implications which can result in serious trouble for an employer.

States have established various tests for identifying "independent contractor." They err on the side of finding "employee" status in most cases such as secretary, janitor and grass mower. At stake for government entities are taxes including FICA (Social Security/Medicare), income tax, and unemployment insurance/taxes. For insurers, workers' compensation premiums are at stake in a legal environment where state law is likely to find an injured "independent contractor" to be an "employee" if the contractor relationship is not properly constructed.

The IRS uses a 20-factor test to determine if a worker is an "independent contractor" or "employee." In practice they look to whether the worker:

- Has a written agreement;
- Is able to suffer a loss or make a profit under the agreement;
- Has a separate place of business or pays fair market rent on the employer's premises;
- Has a significant investment in facilities and tools; and
- Offers services to the general public or is paid exclusively on commission.

Oregon, for example, has additional tests.

The worker must:

- Obtain necessary licenses to provide the service;
- Provide the services to two or more persons in a 12 month period and solicit new contracts; and
- Have the authority to hire and fire persons to assist in the business.

In a recent example presented to us a church wished to have a person provide cleaning services for the church, but intended to provide the person an account for cleaning ma-

terials. This does not meet the independence test since the cleaning service should assume the risk of consumable material and equipment costs, and build it into the hourly rate or contract price. If the going rate for custodial employees is, for example, \$15/hr., then you should expect to pay an independent contractor at a rate of \$22/hr. or higher, plus a factor for equipment and supplies. After all, (s)he must pay self-employment taxes

(FICA), income tax, and other benefit costs such as healthcare and workers' compensation.

If your honest intent is to hire an "independent contractor" then you must make it so by requiring a contractor to pass certain tests:

- Require documentation of a business license as required by state or local jurisdictions.
- If the contractor has employees, then (s)he must have an FEIN (Federal Employer ID Number).
- Require evidence of appropriate construction trade licenses where they are required at state or local levels.
- Require evidence of workers' compensation insurance. Where a small employer may be exempt, consult an attorney to assure an ironclad risk transfer to the contractor.
- Make it clear that an IRS Form 1099 will be issued.
- Be sure your contract contains an indemnity agreement.
- Require proof of insurance for General Liability and Workers' Compensation.



Boy Scouts of America, What You Should Know!

The Boy Scouts of America (BSA) has been in the news recently regarding the issue of LGBT membership/leadership. Most notably the BSA Board was considering permitting local "chartering organizations" to have a choice, recognizing that BSA is not really a hierarchical organization, but more an educational franchise. The chartering organization for Boy Scout troops is most commonly a church. Ironically, when we discuss with churches how they share their facilities with others, the church may mention the Boy Scouts and refer to them as "they" and the church may not know who the chartering organization is, even if it is the church! They also do not realize that the local Boy Scout troop is not insured by BSA.

The church may indeed be the chartering organization for the Boy Scout troop, but over the years and with many changes in church leadership, the church has lost track. A troop leader may be renewing the annual Charter Agreement without authority of a church officer. If your church is the chartering organization, you literally own the troop and are responsible for their conduct, and you own their canoes, tents, trailers and other property. Most importantly, you are responsible for their abuse prevention program including the vetting of their leaders.

If you have a Boy Scout troop at your church, we would like you to find the annual Charter Agreement. Perhaps the troop leaders have it. Determine who the chartering organization is. If it is your church, was the agreement signed by an authorized officer of your church? If your church is not the chartering organization, determine who that is and look into their insurance arrangements. The chartering organization (not the troop) should sign a facilities use agreement with your church which includes an indemnity agreement.

The Girl Scouts is organized and managed in a completely different way. They are a hierarchical and centrally-managed organization. If they use your facilities, you should have a facilities use agreement.

Cell Phone Tower Antenna Leases!

It sure sounds like a good idea — a cell antenna on your church property would generate some money! As a practicing attorney who represents churches and property owners on cell tower leases, here are some suggestions to increase the benefits:

- Rents should be in the \$1,500 to \$2,500 a month range, more for locations near residential areas.
- Make sure the church (not the cell company) gets the additional rent if other companies put their antennas on a cell tower or your church. Overlooking this is one of the most common mistakes churches make.
- Existing cell tower leases can be "gold mines," worth a lot if they are sold, and worth more if kept by the church.

Other risks stand out:

- When structured properly, a cell company's insurance can protect a church if an antenna falls and hurts someone, or if a person working on it is injured. However, the insurance clauses in leases typically don't do this. Good insurance provisions to protect your church are technical and long, but those in lease offers are usually only a sentence or two. Flaws include low

limits, permission to "self-insure," no waiver of subrogation, coverage is not primary, and more.

- Another risk is to the church's basic operations and mission. In general, cell leases try to make the cell company's use of church property primary taking precedence over the church's own needs. The lease may prevent expansions, maintenance/repairs; or allow far more antennas and equipment such as noisy generators.

The good news is that cell leases are not "take it or leave it" arrangements, but are open for negotiation on terms to increase benefits to the church and reduce risks. To be good stewards, churches should have a lease proposal reviewed by a specialist, such as an attorney.

The same kind of review should be done for all proposed changes/amendments. The reason is that most of the time the amendments deliberately have "fine print" intended to take away your benefits and protections. Too often I've seen good lease provisions gutted by later fine print.

Finally, many churches are getting offers



to "buy out" existing leases as well as the leasing rights for the church roof or land for the next fifty to one hundred years. Such buyout offers usually cost churches money. They are much riskier than cell leases, and they can truly can lead to churches "mortgaging their future." Be very cautious and skeptical about such buyouts and don't agree to them without detailed legal advice.

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Who's Driving?

Many churches rely on members to transport others to off-site events or do errands for the church using their own vehicles. In most states, the principle is "insurance follows the car." That is, the vehicle owner's insurance is primary in the event of an accident even though the owner may be an agent of your church. (In no-fault states, different rules will apply.) That is a simple enough principle as long as injuries/damage is minor.

However, when injuries are severe and/or children are involved, your church may become involved under the legal principle *respondeat superior* — "let the master answer." To avoid a claim of "negligent entrustment," it is always necessary for your church to think about who is representing you behind the wheel. This is why the IB provides a "non-owned and hired vehicle" endorsement in our package with high insurance limits. When transportation is needed frequently, an explicit vehicle use policy that requires a state Motor Vehicle Record (MVR) check is strongly recommended, and rule one, at a minimum: do not let minors transport minors ever. The higher the age threshold for driving the better; we suggest at least 21. Remember, rental agencies will not rent a vehicle to a person under age 25 for a reason.

A **Vehicle Use Policy** and other related information is available on the our website under **Safety Solutions/Transportation**.

HIPAA and Your Church!

The Health Insurance Portability and Accountability Act is commonly referred to in conversations about "privacy," particularly that relating to medical status and diagnosis. HIPAA's scope is quite limited, applying principally to health insurance plans, health care providers and health care clearing houses. We were recently asked about sharing of information by hospital visitors with the pastor and other volunteer visitors with respect to the patients they visited. We advised the church there should be no sharing of medical information whatsoever; that the patient should decide in every case to whom (s)he would reveal medical details. In this way, information would always be provided first hand, never subjected to embellishment, speculation or error.

A patient might provide a written statement with permission to publish it, as in a prayer request. Otherwise, we should have the utmost respect for individual privacy, especially where provided by statute. Understand also, that some things you consider to be private are actually a matter of public record, such as criminal convictions, and even your voter registration. As a matter of respect and justice, we should err on the side of providing confidentiality even when there is no strict right of privacy. Now that you are running background checks, there is more reason to be wary.

Among areas covered by the Personal Injury part of General Liability insurance is "oral or written communication that violates a person's right of privacy" (subject to other policy terms and conditions). Whether or not there is a strict right of privacy, your church may find itself a defendant in a privacy claim. There will be a cost to your church's reputation as well as legal expenses to defend a claim. The latter is covered by insurance, but the former is not.

Vacancy+Mold=Disaster—Lessons from a Loss

In January, 2013 a perfect storm struck one of the participating churches in our program. It was not one of the storms that plowed through the plains; this one came from inside. A one-story frame parsonage had been vacant for a long time. The property was visited in December, but just after, a pipe burst in the basement. Water flowed in faster than it could flow out via floor drains – over 250,000 gallons!! – until it was discovered roughly two weeks later. The furnace continued to run for a bit, which maintained heat in the presence of moist air. The result was a dramatic blossoming of mold both in the basement and main floor of the house (*actual photo to right*).



Because of the mold, repair of this loss would require a complete gutting of the house and replacement of all interior surfaces, fixtures and wiring. Removal of the mold-covered materials would require special equipment and skilled workers. However, the mold is so bad in this case that the local authorities will not issue a building permit. The house will be razed. It's a total loss.

The three storms that converged to make this a major loss were (1) vacancy; (2) burst plumbing; and (3) mold. **Vacancy is a serious risk factor for property**, so much so that insurers often refuse to provide coverage for vacant buildings. Where vacancy is permitted, the rate is higher and there are restrictions on the kinds of loss to be covered and other requirements of the owner to protect the property. Burst plumbing in this case was a random event, but would not be covered if the building was unheated and the plumbing froze. But the most striking element was the mold.

In a period of basically two weeks, mold destroyed the house. In dramatic situations as this, one generally has 72 hours to act to prevent mold. Mold is a common occurrence, triggered by a somewhat complex mixture of physical conditions. Insurance coverage responds to mold damage only in limited circumstances. Mold may creep in as a result of leaks due to neglect, or from poor design of HVAC systems - neither of which is covered by insurance.

Whenever you discover mold growth, you cannot ignore it. You will need to discover the cause and, literally, remove the food and water that permit mold to grow. That usually means a bit of prompt demolition. Then you must find the moisture source and stop that as well.

Workers' Compensation:

What you don't know can hurt you!



What is, and why do we have workers' compensation insurance (WC)? It is a system of no-fault medical and disability income benefits for employees who are injured in the "course and scope of employment." It is a benefit that is required in every state. WC laws came into being early in the 20th century as the consequence of the disabling injuries that became common from the onset of the Industrial Revolution.

Previously employers could deny liability for injuries to employees based on Common Law defenses: assumption of risk; contributory negligence; or negligence of a fellow servant. Now WC laws deny employers these defenses in exchange for a no-fault system of defined benefits. The principles have changed little except for the expansion of the kinds of injuries recognized such as occupational disease and repetitive trauma.

While WC is provided in 46 states through an insurance policy from a private company, the benefit amounts and requirements are regulated by state laws. Where adjudication of claims is necessary, it is done through specialized state agencies, not through civil courts or by the insurance companies themselves. Employers do not decide whether an injury is compensable under workers' compensation laws. Most importantly, there are **strict requirements on employers to timely report employee injuries**. Failing to do so may result in financial penalties.

Because WC is experience-rated, penalties come back to employers quickly in the form of higher premiums. The best means to control WC costs is early reporting and medical intervention. As an employer you must never dismiss or discount an employee's injury. You cannot direct an employee to seek care

via health insurance or ask the employee to pay for his/her own medical care. In all cases, workers' compensation is the primary coverage. Work related injuries are not covered by General Liability insurance or its Medical Payments part. Talk to your agent and understand how to report employee injuries in your state.

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