

Lost in Space: Managing Facility Rental Risks



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The goal of maximizing the use of your nonprofit's facilities is an admirable one. For many organizations, permitting—or encouraging—other nonprofits to use temporarily or regularly vacant space is a practical way to advance your organization's reputation in the community and support the missions of kindred agencies. Despite the myriad potential upsides of sharing your space with others, the risk of loss or harm stemming from visitor use of your premises warrants thoughtful consideration by risk leaders. Taking things like contracts, leases and insurance into consideration will decrease the chances that someone will react with a "Warning, warning!" like the Robot from the TV series *Lost In Space* (1965-1968), when confronted with the possibility of another nonprofit using your facility.

To Contract or Not: Is That The Question?

One issue that arises from an openness to let others use your space is when and whether to enter into a written contract with users of that space. Although a written contract to use a conference room, foyer or patio room for a few hours may seem like overkill, forgoing the formality of a contract can lead to painful and costly consequences, such as:

- Lack of clarity about who is responsible for property damage or other harm occurring during the visitor's use of the space
- Unintentional violation of your nonprofit's privacy policies or protocols regarding confidential information about your agency or your clients
- Missed opportunity to share important rules about the safe and appropriate use of your space
- Uncertainty or unnecessary stress regarding the terms of the use, such as number of days, time of day, or limits on the use of the space (e.g., team-building workshop, choir rehearsal, watercolor painting class, etc.)

Ten Key Provisions for Temporary Use Space Agreements

Using a written agreement anytime your nonprofit permits use of its space is a crucial first step in managing the potential downside risks. At a minimum, the drafting of a written agreement requires focus on the possible what-ifs associated with use of your buildings, office space and other facilities. At its best, the use of an agreement will ensure that key issues are sorted out between the parties before occupancy or before something goes wrong. Some of the most important components of a space use agreement include:

1. *Timetable* – indicate when the space may be used.
2. *Description of space and permitted use* – note the specific room, area, or space your visitor is permitted to use and the general purpose (or limitations) for the use (e.g., the main conference room may be used for your upcoming board meeting).
3. *Points of Contact* – include the name, phone number and email address of the primary point of contact at the visiting nonprofit as well as similar information for your nonprofit.
4. *Insurance* – specify your insurance requirements, including whether you require evidence of the visiting nonprofit's coverage and designation of your organization as an additional insured.
5. *Rules* – in straightforward terms, describe the rules pertaining to the space to be occupied by the visiting group. Keep in mind that a long, overly broad list of applicable *and* inapplicable rules may be easily dismissed; a simple, succinct list appropriate to the space is always preferable. For example, you might want to prohibit visitors from attaching things to the walls in a wallpapered conference room, or ask visitors not to move heavy furniture in a room with soft pine flooring.
6. *Maximum capacity* – remind your visitors about the maximum capacity for the space, which may be at or under the maximum set by building and fire codes in your area.
7. *Equipment* – if applicable, note whether equipment in the room is available for the visitor's use, and if so, whether there are rules related to that use.
8. *ADA applicability* – reference whether use is subject to the public accommodations provisions of the Americans with Disabilities Act (learn more at [access-board.gov](https://www.access-board.gov), or [Chapter 1: Using the ADA Standards](#)).
9. *Use of Name and Marks* – note whether you permit or prohibit the use of your nonprofit's name on promotional materials related to the event or activity, or require that the name be used (but not your logo) in a certain manner, such as "The location of the workshop is: ABC Nonprofit, 123 Main Street, 1st floor, Anytown, USA."
10. *Fees* – confirm the fee for use, if applicable, and if there is a fee, when and how it must be paid.

Risk Tips

Although drafting and finalizing a contract will help clarify terms between your organization and the people and agencies using your space, there are some other risk tips to consider as well.

- **Is it UBIT?** – If your nonprofit rents space to other groups, the income you receive from those rentals might be *unrelated business income* (UBI). Whether or not rental income is UBI subject to *unrelated business income tax* (UBIT) is based on whether (or not) the rental substantially relates to furthering your nonprofit's exempt purpose. For example, a nonprofit formed specifically to foster collaboration and reduce inefficiency among nonprofits is likely furthering its exempt purpose when it rents space to other tax-exempt nonprofits. According to the NEO Law Group, "If the same nonprofit were to begin renting some of its space to for-profits, the income from such rentals would likely be subject to UBIT and may even cause the organization's activities to be viewed as too commercial in nature to qualify as exempt." In her article *UBIT – Issues for Shared Spaces*, Erin Bradrick adds that, "...if an exempt organization with a completely unrelated purpose had extra space in its building and decided to rent it to other nonprofits or to for-profits, those rentals would unlikely be considered substantially related and the rental income may be subject to UBIT." The IRS website explains that tax exempt organizations with \$1,000 or more of gross unrelated business income must file the [Form 990-T](#). These organizations must also pay [quarterly estimated tax](#) if they expect their yearly taxes to be \$500 or more.
- **Schedule a Safety Briefing** – Before turning over any space in your facilities to a visiting group, it's a good practice to conduct a short safety briefing with your point of contact at the visiting organization. To prepare for that briefing, make a list of what the user might need to know in an emergency, such as:
 - Should an alarm or smoke detector go off while you're here, it's our policy that everyone in the building must evacuate. Lead your group to the rear section of our parking lot, which is our designated assembly point. Do not re-enter the building until directed to do so by emergency response personnel.
 - If a member of your group experiences a medical emergency, call 911 without delay. Confirm our address with the 911 operator: 123 Main Street, 1st floor, Anytown. For minor injuries, please feel free to use the supplies in the first aid kit located above the sink. Let us know that you've used these supplies before leaving, so we can re-stock the kit!
- **Equipment and Internet Use** – Like the pre-visit safety briefing, explain to your guests what equipment, supplies, and Wi-Fi networks are available for their use. Many organizations offer a guest Wi-Fi network to ensure that the main Wi-Fi network remains secure. Consider posting guest Wi-Fi access instructions in the room(s) available to visitors. Be sure to notify visitors if any networks, equipment or supplies are off limits.

When and How to Use a Lease

In some cases, the permitted use of your facilities or grounds may be more than temporary and casual. Use a lease anytime your nonprofit wants to permit the occupancy and use of your property for more than a short time, and keep in mind that a written lease is an enforceable contract that should contain specific types of information. For example, when parties (A) and (B) agree that (B) will rent space from (A) in order to do purpose (C), the lease should include the following key terms:

1. Contact information of the specific person(s) renting property from you, including name, telephone number, and street address (if available, a street address other than the address of the property the lessee is renting from you). The organization name should also be included with this information, but the primary purpose of obtaining this information in the lease is to know who will be the contact person should the need for contact arise.
2. The address and a specific description of the leased property, with a statement about the property's current condition (include reference to common areas the lessee may use and any limits on that use).
3. The specific duration for which the property will be leased.
4. The rental amount due, when, where, and in what form, including whether late fees will be assessed if rent is not paid on time, whether there is a late payment grace period, and what charges the lessee may expect to incur should the check or other payment bounce.
5. Any security deposit you obtain from the lessee and whether interest will be earned on the amount, and whether any legally permissible nonrefundable fees will be assessed (e.g., for cleaning or pets).
6. Any right you have to enter and inspect the property at reasonable times and upon reasonable notice, including the amount of notice required.
7. Permission to do any credit or reference checks (such as speaking with prior landlords) that you want to do.
8. The permitted uses of the property and any specific limitations on the uses.
9. That the lessee can't make any alterations to the property without prior written permission.
10. Who is responsible for the property and/or liability insurance on the property and the evidence that this insurance is in force.
11. Who is responsible for repairs and maintenance of the property, and when the lessee must notify you of any unsafe or defective conditions in the property.
12. An indemnification clause protecting the nonprofit from liability arising out of the rental of the property and requiring the lessee to name your nonprofit as an **additional insured** on the lessee's general liability policy.
13. When and how the lease will end, including whether there is an automatic or other renewal provision.
14. An acknowledgement by both parties that the lease is binding (typically by signature and date signed).

Contracting Process Tips

As described in the NRMCM book [*Exposed: A Legal Field Guide for Nonprofit Executives*](#), establishing a contracting process is "very important to protect the long-term health and valuable assets of a nonprofit." NRMCM recommends that a contracting process include the following elements:

- A written contract approval policy assigning certain contracting or purchasing decisions to specified employees.
- A clear statement to all members of the organization (employees *and* volunteers) about their contracting authority or lack of contracting authority.
- Tips or recommendations to employees and volunteers who do not have contracting authority about what they can do to avoid inadvertently committing the organization to a contract.
- A statement specifying what the nonprofit requires before a contract will be approved.
- The position(s) in the organization (or outside legal counsel) responsible for reviewing legal, programmatic, and financial content of contracts.
- The position(s) in the organization responsible for overseeing performance, communicating problems, authorizing changes in scope or deadlines, or recommending contract termination.
- The position(s) in or outside the organization responsible for reviewing the insurance and indemnification provisions in contracts to make certain that promises to indemnify are adequately supported by insurance and that coverage required under the contract is reasonable and in place.
- The position in your organization responsible for making certain that the nonprofit's assets, such as copyrights and trademarks, are adequately protected.
- The position(s) in your organization responsible for reviewing and approving the financial terms contained

in proposed contracts.

Certificates of Insurance

Property owners often request a certificate of insurance (COI) from short-term facility users and lessees. A certificate of insurance is a document that delineates the types of insurance policies written, policy dates, coverage limits, and the insuring company or companies in force at the time the certificate is issued. A certificate of insurance is commonly referred to as *proof of insurance*. However, most certificates have a disclaimer such as the one on the ACORD Certificate of Liability Insurance (ACORD 25-S 7/97):

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

Consequently, if the certificate is wrong, you as the certificate holder have very limited (if any) recourse against the insurer of the entity represented by the certificate (the insured). If your rental agreements or leases require that your nonprofit be added as an additional insured on the visitor or lessee's policy, they have not met the terms of the contract until the insurance company actually endorses the policy. A certificate showing the party as an additional insured is meaningless unless an endorsement has been issued.

COIs: When and How

You should request a certificate from another party when you want to confirm that they have insurance. You want to ensure that the other party has insurance so that if they cause a loss, you will have confidence that they have a source of funds from which to pay for the loss. Ideally you should request a certificate anytime your nonprofit permits use of your space or facilities. And if you ask for the other party to provide you with additional insured status, request a copy of the actual endorsement. After receiving the certificate, check it for accuracy to make certain that it syncs up with the insurance requirements (type of coverage, limits of liability, etc.) in your rental agreement or lease. After verifying the certificate, file it for future reference. Retain the file as active for the life of the contract or agreement (and any relevant indemnification period). If the agreement extends beyond the current insurance policy period, you need to establish a system for requesting or issuing a new certificate when the present one expires. Retain the contract file and applicable certificates based upon your organization's records retention program for contracts and agreements.

Additional Insured Status

An *additional insured* is a person or entity, other than the *named insured*, that is protected by a particular insurance policy. An additional insured endorsement is the contract by which additional insured status is granted. When your nonprofit requires that a lessee or agency using your space add your nonprofit as an additional insured, the agency has not met the terms of the contract until the agency's insurer endorses the policy, contractually extending additional insured status.

Fans of the TV series *Lost In Space* (1965-1968) or the movie remake from 1998, may recall watching the intrepid Robinson family cope in the cosmos, after their space flight was sabotaged by a stowaway. Although it was unclear whether the Robinsons considered contingencies before setting off on their voyage to Alpha Centauri, the show's theme reminds us that strange and unpleasant things sometimes befall even the nicest people. Considering possible mishaps involving the nice groups that want to borrow or rent your facilities is key to reducing their likelihood and ensuring that you're ready to respond.

Melanie Herman is Executive Director of the Nonprofit Risk Management Center. She welcomes your questions about facility risk management at Melanie@nonprofitrisk.org or 703.777.3504.

Resources:

- [UBIT – Issues for Shared Spaces](#), by Erin Bradrick, NEO Law Group
- [Chapter 1. Using the ADA Standards](#), United States Access Board
- [EXPOSED: A Legal Field Guide for Nonprofit Executives](#), available at www.https://nonprofitrisk.org/
- [COVERED: An Insurance Handbook for Nonprofit Executives](#), available at www.https://nonprofitrisk.org/