

## Staffing Decisions Impact Liability Exposures

*Article provided by Professional Liability Agents Network (PLAN)*

*This material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, confer with a qualified professional who can provide guidance that considers your 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 head count.



### 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.

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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.

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Subconsultants are certainly not new to design firms. Most architects, for example, have experience hiring subconsultants from a variety of engineering disciplines. However, it is becoming more common to find architects subconsulting with other architects, civil engineers subconsulting 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 EJCDC 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.

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# Risk Management Seminar Series



## Risk Management Boot Camp: The Triangulation of Safety, Claims and Human Resources

Friday, May 8, 2015

7:30am Registration

**8:00am - 4:00pm** Program

## Vehicle Safety Program Tune Up

Friday, May 29, 2015

7:30am Registration

**8:00am - 10:00am** Program

## Sexual Harassment Prevention Training

Friday, June 5, 2015

7:30am Registration

**8:00am - 10:00am** Program

## Building a Respectful Workplace: Preventing Abusive Bullying and Un- professional Behavior in the Workplace

Friday, June 12, 2015

7:30am Registration

**8:00am - 10:00am** Program

## Reserve Early, Seating is Limited!

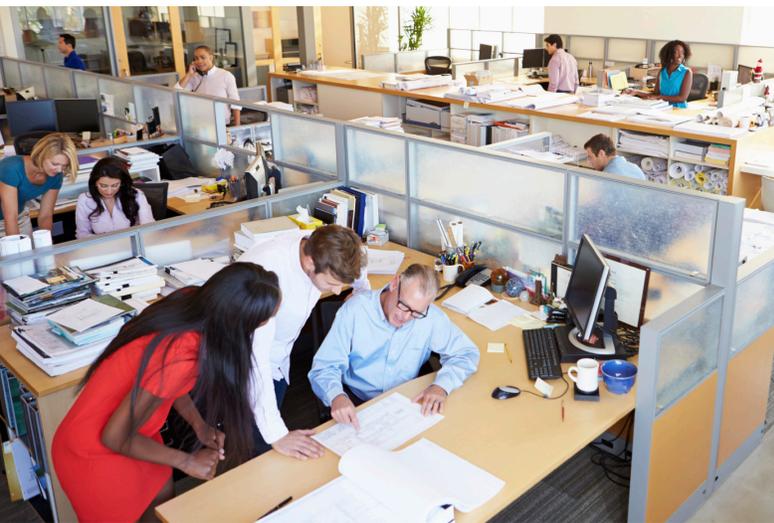
To register, click on the 'register now' button in the announcement email, or contact Bethany Mongold at [mongold@cavnac.com](mailto:mongold@cavnac.com) or call 619-744-0540.

*NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.*

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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 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.



3. 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 subconsultant/independent contractor perform construction observation?

If you are the prime consultant, we recommend that you pass through to your subconsultant 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 bor-

row 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. ■

# Primary Causes of Claims for Design Professionals

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*SmartRisk is a leading risk and practice management consultancy for design and building professionals.*

Design professionals can be found liable for claims and damages in various situations. The claims and types of damages depends on who files the claim against the design firm. For example, an owner filing a claim based on a breach of contract, or a contractor alleging negligent design, causing additional construction costs.

The following are four prime causes for liability claims against design firms.

## Contracts

Contract claims against design firms typically include negligence and failure to comply with the standard of care, compliance with the project schedule, and breach of contract requirements. In a negligence-based claim, it must be shown that the design firm failed to perform in accordance with the standard of professional care usually exercised by other professionals in similar circumstances. Design firms have also increased their liability and standard of care by accepting terms such as “best” and “first in class” contract terms.

## Warranty

Design firms find themselves in a difficult position when, through the contract terms they specify, specific results will be obtained resulting as a guarantee of their services. For instance, particular concerns relating to green, sustainable projects where firms are guaranteeing certain energy, water savings, reduced lifecycle costs, and increased building performance.

## Design Liability

Design firms should be judged based on the standard of care exercised by other professionals for services and project type in like situations. The more



complex and unusual a design, the more latitude should be allowed. However, design firms have been found liable because designs have caused increased maintenance and repair costs for owners. Courts have also held design firms liable for damages incurred as a result of approving other firms' drawings that caused damages to the owner.

## Site Inspection

When a design firms assumes responsibility for performing site inspections, they are bound by the performance of those duties. The inspection requirement is an obligation by the firm to provide the owner with assurances that the work is being completed in conformance with plans and specifications. Owners have viewed this service as a warranty of the contractor's work. Failure of the design firm to comply with inspection contract terms can result in liability. Based on the firm breaching this obligation, and the “proximate cause” of the failure of the firm to discover the defect, the firm is then held liable for the cost in correcting the defect. ■

# LIVE WELL



# WORK WELL

May 2015

## May is Skin Cancer Detection and Prevention Month

**D**id you know that it only takes 15 minutes for the sun to damage your skin but 12 hours for that damage to become visible? Many individuals suffer from hours of skin damage before even realizing that their skin is in danger.

Since skin cancer is the most commonly diagnosed cancer in the United States, you should keep these prevention tips in mind:

- Try to stay out of the sun between 10 a.m. and 4 p.m.
- Wear clothes with tightly woven fabric and a hat that shades your face, neck and ears.
- Wear sunscreen every day that has a sun protection factor (SPF) of at least 15.
- Routinely inspect your skin, and, if you suspect that a spot on your skin is new or has changed color or appearance, contact a dermatologist.

## The Importance of Resistance Training

Many Americans are aware that about two hours and 30 minutes of exercise each week is necessary to stay healthy, and many of those individuals choose an aerobic activity, such as running or biking. However, recent research has shown that splitting your two hours and 30 minutes of exercise between varied activities—aerobic **and** muscle-strengthening—improves health the most.

According to the American College of Sports Medicine, adults should aim to do muscle-strengthening activities, such as weightlifting, at least two times a week. Right now, only about 1 out of every 3 adults meets this goal.

A common misconception that many people have is that muscle-strengthening activities are more suited for men, which may stem from the misguided belief that women will “bulk up” too much from that type of exercise. However, women generally do not have the same level of anabolic hormones, which is what causes men to build larger muscles more easily.

In fact, muscle-strengthening activities are extremely important for women to engage in because they are more likely to develop problems with their bones and joints as they age. Increasing muscle strength—through weightlifting or other resistance training—can help prevent those problems.

Resistance training can also help with the following:

- Increasing flexibility and balance, which decreases the number and severity of falls a person may experience as he or she ages
- Maintaining proper weight, as people who have more muscle mass have a higher metabolism—sometimes up to 15 percent higher

Before beginning a new exercise routine or changing up an old one, speak to a medical professional to ensure you are healthy enough. And remember that commitment to a regular physical activity program is more important than the intensity of your workouts, so be sure to choose muscle-strengthening exercises you enjoy.

# Save Money by Shopping for In-season Produce

Groceries can be expensive, and tips for saving money are often time-consuming, such as cutting coupons and making multiple trips to the store each week to avoid waste. One easy way to save on your grocery bill, while also eating healthy food, is to shop for fruits and veggies that are in-season. Another added benefit? In-season produce tastes better.

In-season fruits and vegetables are easy on your wallet because when there is an abundance of these crops, it brings the overall price down. Also, when the produce is local, it costs less to package and deliver it to the store. It's even good for the environment to shop in-season produce, since less gas is used to transport the local, in-season produce.

To find out what vegetables and fruits are in season in your area, visit [www.sustainabletable.org/seasonalguide/seasonalfoodguide.php](http://www.sustainabletable.org/seasonalguide/seasonalfoodguide.php).

## What Veggies and Fruits Are in Season Right Now?

### Pacific Northwest:



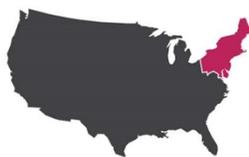
green onions, collard greens, arugula and broccoli

### Upper Midwest:



spinach, asparagus, carrots, parsnips, mint, rhubarb and radishes

### Northeast:



arugula, asparagus, chard and fiddleheads

### Southwest:



apricots, blackberries, nectarines, peaches, arugula, avocados, carrots, cilantro and chard

### South:



blueberries, oranges, plums, asparagus, beets, broccoli and cauliflower

## Sauteed Spring Vegetables

Substitute any out-of-season vegetables in this recipe with ones that are in-season to save a few extra bucks and to amp up the fresh taste.

- ½ cup sweet onion
- 1 garlic clove, minced
- 1 tsp. extra virgin olive oil
- 3 potatoes, cubed
- ¾ cup carrot, sliced
- ¾ cup asparagus, chopped
- ¾ cup sugar snap peas (or green beans)
- ½ cup radishes, quartered
- ¼ tsp. salt
- ¼ tsp. black pepper
- ½ tsp. dried dill

Heat the oil in a medium-sized skillet. Add the onion and garlic, and cook for two to three minutes.

Add potatoes and carrots to the skillet and cover. Turn the heat to low and cook for four minutes, or until the vegetables are tender. Then, add the asparagus, peas, radishes, salt, pepper and dill. Cook for four more minutes, stirring often. Serve hot.

Yield: 4 servings. Each serving provides 70 calories, 1.5 g of fat, 2 g of protein, 13 g carbs, and 170 mg of sodium.

Source: USDA



# Spotlight On



**Cavnac & Associates is proud to support local and non-profit civic organizations, including Veterans Village**



VVSD has served all veterans since 1981 and is dedicated to “Leave No One Behind.”

With five locations throughout San Diego County, VVSD is the only program of its kind in the United States and is nationally recognized as the leader in serving homeless military veterans. Each year VVSD provides services to more than 2,000 military veterans throughout the County of San Diego.

VVSD provides a continuum of care with a full range of comprehensive and innovative services for military veterans that encompasses:

- Prevention
- Intervention

- Treatment
- Aftercare

VVSD extends assistance to needy and homeless veterans and their families by providing:

- Substance Abuse Recovery
- Mental Health Counseling
- Job Training and Job Search Assistance
- Housing
- Food
- Clothing
- Legal Services

Within the last year, VVSD placed over 300 homeless veterans and over 200 other unemployed veterans into long-term jobs with an average starting wage exceeding \$13 per hour.

*For more information about, go to [www.vvsd.net](http://www.vvsd.net)*