

THINKING OF RETIRING? TAKE SOME PRECAUTIONS FIRST

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Pleasant thoughts that come to mind when contemplating retirement run along the lines of relaxation, financial freedom, travel. However, if you have spent your working years in the construction industry, these thoughts can soon turn to their opposites—stress, financial liability, back to work—unless your plans for escape from the workforce to retirement properly account for your future risks. And that means having an effective risk management plan.

It makes no difference whether you have been an employer, an employee or an independent contractor during your career in the design, management or consulting aspects of the industry; after you retire, you remain exposed to any legal claims that might arise from the activities you or your employees were involved in. As an employer, you remain responsible not only for the things you did or were required to do when accepting assignments from your various clients. In addition, you remain “vicariously liable” for any errors, omissions or negligent acts by your employees during the time they were employed by you.

By way of example. A small consulting company hires a summer student to perform inspection services during the course of a construction project. It turns out the inspection was not all that it should have been and contributed to a problem which revealed itself later. Any liability that that student employee might have incurred for the negligent inspection became the employer’s. As an employer on the point of retirement, therefore, you have to be concerned about the shortcomings of all those you employed during your career as well as your own.

Or take a larger consulting firm. All who work for the firm, whether as employees or principals, are responsible for their own errors, omissions or negligent acts. They are also entitled to the protection contained in any contract the firm has with its clients. But they may be fully exposed to claims by others who were not party to the applicable contract.

Likewise, independent contractors remain vulnerable to claims arising out of their performance of services, whether through a personal services corporation or individually. Again, they are entitled to any protection inserted in their personal services contracts with respect to any claim advanced against them by the person or entity that retained them but remain fully exposed to third-party claims.

The class of claims to which retirees from the construction industry, particularly professionals and consultants, remain exposed can stem from the party who retained them, their employers or third parties. The last category would be those persons in sufficient proximity to a project that anyone working on it could reasonably foresee might suffer harm—whether bodily injury, property damage or economic loss; this includes not only subsequent owners of projects but a finished project’s occupants.

This being the case, you may worriedly ask: how long does this exposure last for? The general response is “for a long time” but, more specifically, it depends on the type of claim:

- **Property damage or bodily injury** A claim brought against you for one or both of these is available for two years from the date the claimant discovers, through reasonable means, that you may be responsible in law for the problem. For example: if, in 2008, you designed or provided field services on a project and a problem reveals itself in 2015, the limitation period applicable to any claim the owners may have for property damage would commence in 2015 and expire two years later.
- **Economic loss** If the claim brought against you is for economic loss (which would include the cost of remedying inherent defects in projects that you worked on), then the limitation period is six years from the date the claimant, through reasonable means, discovers (or should have discovered) that you might be legally responsible for the problem. Using the above example, the limitation period for this economic loss claim would not expire until 2021.

In either of these situations, there is an applicable ultimate limitation period, which, in British Columbia, is thirty years from the date you provided the services that gave rise to your alleged responsibility. That is, notwithstanding the two- and six-year periods mentioned above, no action can be brought against you arising out of any services that you provided more than thirty years ago. However, another type of claim to which you might be exposed has an unlimited application period:

- **Regulatory liability** This may apply as a result of work you performed on projects. By way of example, you may have liability for the cost of cleaning up a site that is alleged to be contaminated because of operations carried out by you or under your control many years earlier. The time limit for bringing any such claims is boundless.

Potential liability for professionals, employers and employees in the construction industry is, therefore, broad and long lasting. If your retirement is not properly planned, you may find yourself back at work before you know it. So what can you do?

Obviously, the best strategy is to not make any mistakes while you are in practice. Equally obviously, to be in this position would require spending your entire working career without any clients or being the luckiest person on the planet. Because, in reality, nobody does everything perfectly; so there is always the possibility of claims and the resulting liability they bring.

What you can do to minimize the prospect of one of these claims haunting your retirement is to make certain that your business, whether in construction design or field review activities, has utilized appropriate risk management tools prior to your retirement. First and foremost is having properly drafted contracts with a clear definition of the scope of your services and the limits of your liability. Such a document can go a long way towards protecting you in the case of a claim by a party with whom you had a contract. It will also help with any third-party claims since a contract will describe more clearly than faded memories just what it was you were required to do or not to do.

The next step is to keep good records of a project: in particular, of what you did and said and what others did and said. These can be most valuable for warding off any future attempts to attach liability to you for problems that surface later on a project. Otherwise, liability can be imposed because of the absence of any record demonstrating defensible conduct on your part. Maintaining those records in a retrievable format, whether hard copies or electronic, should be a part of any good risk management program.

Finally, such a program should include liability insurance to protect you against claims. The insurance can afford you not only a full defence to any claims, at your insurer's expense, but pay on your behalf any liability which might ultimately be imposed by a court or agreed upon in settlement.

So if you are thinking of retirement that you want to be relaxing and carefree, be sure you leave your office in good order before you close the door.