

ANTI-INDEMNITY STATUTES IN ALL 50 STATES

Indemnity clauses *shift* the responsibility to pay damages (often including attorney's fees and litigation costs) from one party (indemnitee) to another party (indemnitor), often without regard to who actually caused the loss. Owners and general contractors have historically insisted on subcontractors and suppliers of goods and services agreeing to indemnity clauses in contracts if they want to get the work. An example of such a clause reads as follows:

Subcontractor shall indemnify and hold harmless the Owner, Architect, General Contractor, and agents and employees of any of them from and against claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from performance of the Work.

The above language also serves as a "hold harmless" clause by which one or both parties agree to absolve the other party and not hold it responsible for any loss, damage, or legal liability. Such clauses are often woven together and intertwined in contract language. Many states have enacted legislation intended to right this wrong and place the financial responsibility for accidents and injuries on the party responsible for causing them. Forty-five (45) states have enacted anti-indemnity statutes that limit or prohibit enforcing indemnification agreements in construction settings. Anti-indemnity legislation is intended to prevent the party with superior bargaining power (owner/general contractor) from taking advantage of the party with inferior power (subcontractor). Also, some states with anti-indemnity legislation protect only the government by limiting the application of these rules to public projects. There are three forms of indemnity agreements:

- (1) **Limited:** Subcontractor assumes only the responsibility for its own negligence – if it is solely at fault. There is no protection if the owner/general contractor is even partially at fault. All states allow limited indemnity provisions.
- (2) **Intermediate:** Subcontractor assumes responsibility for its own sole negligence or partial negligence. If the owner/general contractor is solely at fault, there is no indemnity. There are two types of intermediate indemnity:
 - (a) **Full Indemnity:** If the subcontractor is partially at fault, he pays all the damages. This allows an owner/general contractor who was 99% at fault to receive indemnity from the subcontractor who was only 1% at fault.
 - (b) **Partial Indemnity:** Indemnity is on a sliding scale based on the extent of the subcontractor's negligence. This sets a cap on the amount of indemnity that can be had. If the owner/general contractor is 51% at fault it is indemnified only for 49% of the total damages.
- (3) **Broad:** The subcontractor must indemnify regardless of who is at fault and indemnifies the owner/general contractor for the owner/general contractor's sole negligence, the subcontractor's sole negligence, and any joint negligence of the two. The entire risk of loss is transferred to the subcontractor. This is the most onerous of indemnity clauses and the one most targeted by anti-indemnity legislation.

If the below chart shows that a state prohibits Intermediate Indemnity and allows only Limited Indemnity (*i.e.*, indemnity only for the indemnitor's own negligence), this generally means (but not always) that the state also prohibits the less restrictive Broad Indemnity. In such state, the intermediate and broad indemnities are void.

There are many varieties of indemnity clauses and not every state deals with them in the same way. Most states limit the application of their anti-subrogation statute to "construction contracts" and still others to public, as opposed to private owners. Although every state differs, a typical definition of "construction contract" is:

"Construction contract" means a written or oral agreement relating to the construction, alteration, repair, maintenance, moving, demolition or excavation or other development or improvement to land.

Understanding the variety of anti-indemnity statutes encountered from state to state along with their interaction in a multi-state economy is not always easy. We can start with the very simple fact that every state allows limited indemnity agreements. However, that is where the agreement ends.

NOTE: This chart deals with anti-indemnity statutes only. Many states have judicially-developed rules which may prohibit indemnity as well. For example, in Texas, in order for an indemnity agreement (of any type) to contractually indemnify another for his own negligence, the contract must, within its four corners, specifically set forth that intent. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987) (known as the *Ethyl* Rule). To do so, however, the contract must express that intent in specific terms within the four corners of the contract (express negligence test) and the language must be conspicuous by being in capital letters if it is a heading or in larger or contrasting type or color (conspicuousness test). *Dresser Industries v. Page Petroleum*, 853 S.W.2d 505 (Tex. 1993).

Additional Insured Clause

Indemnity agreements provide "assurance" not "insurance." They are only as good as the indemnitor's ability to make good on its indemnity obligations. Therefore, indemnity clauses are often intertwined with additional insured clauses which require the subcontractor to amend its liability policy to make the owner or general contractor an insured under the policy. An example of such a clause is as follows:

The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Owner's lender(s), the Owner's landlord, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

Additional insured clauses in contracts are legally separate and distinct from but are often interwoven with indemnity clauses. The reason for this is that most Comprehensive General Liability (CGL) policies exclude coverage for "bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

A subcontractor may be required by contract to purchase insurance which names the owner/general contractor as an "additional insured." They usually require an additional insured endorsement to the insurance policy of the subcontractor. The additional insured endorsement adds the general contractor and/or owner as an insured under the subcontractor's policy and extends the benefits of the policy to the additional insured and obligates the subcontractor's carrier to insure it. A few states (Kansas, Oregon, and possibly Ohio) which limit indemnification agreements in construction contracts apply the same limitations to contractual requirements for insurance coverage. Most anti-indemnity statutes apply exclusively to construction contracts. However, in Oregon, Kansas, and potentially Ohio, the anti-indemnity statutes limit statutory indemnity to contractually required insurance as well. The significance of these statutes, with regard to indemnity, is that additional insured coverage will be extremely limited. In the majority of states, because additional insured status is simply another way to transfer risk.

The parties may limit the additional insured requirements (in the contract and/or the insurance policy) to provide coverage only as to the other party's indemnification obligations and not any liability of the additional insured that is beyond the scope of the contractual indemnification. This is usually carefully spelled out in the policy's additional insured provisions and/or endorsements. However, in some situations the additional insured contract provisions and the policy

provisions can be construed to provide the additional insured/indemnitee with coverage well beyond liability for contractual indemnification, possibly even extending to the sole negligence of the additional insured. A loophole could exist whereby the indemnity is invalid, but the indemnitee still obtains relief as a result of its status as an additional insured under the subcontractor’s liability policy. The chart below contains an easy-reference column to reveal if a particular state has joined the growing but still limited ranks of states which have enacted statutes or ruled in such a way as to close this Additional Insurance loophole.

Oilfield Anti-Indemnity Statutes

In addition to the general anti-indemnity statutes discussed generally above, Texas, Louisiana, New Mexico, and Wyoming have enacted oilfield anti-indemnity legislation which specifically addresses the oilfield-services industry. Their purpose is to create a level playing field when owners and operators of oil and gas wells enter into a Master Service Agreement (MSA) with contractors providing services and materials on a well or rig. These statutes are also referenced in the chart below.

The following chart is a general summary of the anti-indemnity statutes and laws for all 50 states. It should serve as a starting point for research in this confusing and detailed area of law – not an ultimate research tool or final authority on the subject. This area of the law is a fast-moving target. Although every effort has been made by Matthiesen, Wickert & Lehrer, S.C. to see to it that the chart is accurate, this chart is provided as a convenience to our friends and clients only and the individual laws of each state should be checked and/or counsel should be consulted to make sure that the chart below is and remains accurate and complete. General Contractor (GC), Construction Manager (CM) and Subcontractor (SC) are abbreviations which may be used in the chart.

STATE	PROHIBITS BROAD INDEMNITY	PROHIBITS INTERMEDIATE INDEMNITY	ADDITIONAL INSURED PROHIBITED	APPLICATION	STATUTE	COMMENTS
ALABAMA						No Statute
ALASKA	X			Construction Contracts	Alaska Stat. § 45.45.900	Does not apply to the handling, containment, or cleanup of oil or hazardous substances.
ARIZONA	X (Private Contract)	X (Public Contract)	X (Public Contract)	Construction or Architect/Engineer Contract	A.R.S. §§ 32-1159, 34-226, 41-2586	Exception to all three statutes: Subcontractor (indemnitor) may indemnify person not a party to the construction contract and who, as an accommodation, enters into an agreement with the subcontractor that permits the subcontractor to enter on or adjacent to its property to perform the construction contract for others.
ARKANSAS	X			Construction Contracts or Agreements	Ark. Code §§ 4-56-104; 22-9-214	Applicable to contracts/agreements entered into after July 31, 2007.

STATE	PROHIBITS BROAD INDEMNITY	PROHIBITS INTERMEDIATE INDEMNITY	ADDITIONAL INSURED PROHIBITED	APPLICATION	STATUTE	COMMENTS
CALIFORNIA	X	X		Construction Contracts	Civ. Code §§ 2782 New § 2782.5 also prevents indemnity of GC, CM, or other subcontractor for “active negligence.” § 2782(a)	Applicable to contracts entered into after January 1, 2013. Neither public nor private owner can force subcontractor to indemnify or insure another party for that other party’s “active negligence or willful misconduct,” for defects in the project’s design provided to the subcontractor, or for claims arising outside the scope of the subcontractor’s work. (Exceptions: (1) private owner acting as contractor or supplying materials/equipment § 2782(c)(1), or (2) private owner performing improvement to single-family dwelling § 2782(c)(3). Indemnity for sole negligence still applies to these two exceptions). List of inapplicable circumstances to which new § 2782.05(a) does not apply found in § 2782.05(b). § 2782(a) appears to narrow, but not completely prohibit circumstances under which subcontractor can be required to name a GC, CM, or another SC as additional insured.
COLORADO		X	X	Construction Contracts or Agreements	Colo. Rev. Stat. §§ 13-50.5-102; 13-21-111.5	Does not apply to not apply to a breach of trust or of some other fiduciary obligation.
CONNECTICUT		X		Construction Contracts or Agreements	Conn. Gen. Stat. § 52-572k	Applicable to contracts entered into after October 1, 1977.
DELAWARE		X		Construction Contracts or Agreements	Del. Code, Title 6 § 2704	Does not apply to any insurance policy issued by a “duly authorized” insurer “insuring against losses or damages from any causes whatsoever”.
DISTRICT OF COLUMBIA						No Statute
FLORIDA		X (Public Contract)		Construction Contracts or Agreements	Fla. Stat. § 725.06	Applicable to contracts entered into after July 1, 2001.

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GEORGIA	X		X	Construction Contracts	Ga. Code § 13-8-2	Does not apply to any obligation under workers' compensation or any type of coverage or insurance issue concerning workers' compensation.
HAWAII	X			Construction Contracts or Agreements	Hawaii Rev. Stat. § 431:10-222	Does not apply to any valid workers' compensation claim.
IDAHO	X			Construction Contracts or Agreements	Idaho Rev. Stat. § 29-114	Did not affect contracts enacted prior to statute effective date in 1971.
ILLINOIS		X		Construction Contracts or Agreements	Indemnification for Negligence Act, 740 I.L.C.S. § 35/0.01, et seq. (§ 35/1-3)	Not applicable to insurance contracts or agreements, or construction bonds.
INDIANA	X			Construction Contracts	Ind. Code § 26-2-5	Not applicable to "highway contracts", and statute has "dangerous instrumentality exception".
IOWA		X		Construction Contracts	Iowa Code § 537 A.5	Does not apply to "any obligation of strict liability otherwise imposed by law".
KANSAS		X	X	Construction Contracts	Kansas Stat. § 16-121	The anti-indemnity statute limits statutory indemnity to contractually-required additional insured coverage as well as to indemnity. Statute voids contractual requirements in public and private projects to indemnify or provide liability coverage to another person as an additional insured for that person's own negligence, acts or omissions. There are six exceptions. Kansas Stat. § 16-1803 (private) and § 16-1903 (public) nullify contract clauses that waive subrogation rights for losses covered by liability or workers' compensation insurance with certain exceptions.
KENTUCKY		X		Construction Contracts or Agreements	Kentucky Rev. Stat. § 371.180	Applicable to contracts entered into after June 20, 2005.

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LOUISIANA	X (Public Contract)	X (Public Contract)		Construction Contracts	LSA §38:2216(G) LSA §9:2780(A)(G) (Louisiana Oilfield Indemnity Act)	Section 2216 invalidates indemnity and hold harmless agreements from contractor to public body and from contractor to any architect, engineer. The LOIA applies to oil and gas operations and nullifies indemnity, additional insured clauses. Waiver of subrogation void where there is corresponding suit for contractual indemnity. <i>Fontenot v. Chevron</i> , 676 So.2d 557 (La. 1996).
MAINE						No Statute
MARYLAND	X			Construction Contracts or Agreements	Md. Code Ann., Cts. & Jud. Proc. 5-401	Not applicable to validity of an insurance contract or workers' compensation issues.
MASSACHUSETTS	X			Construction Contracts	Mass. Gen. Laws, ch. 149 § 29C	N/A
MICHIGAN	X			Construction Contracts	Mich. Comp. Laws § 691.991	Applicable to all contracts entered into before and after enactment of statute, but only when act of negligence occurs after statute enactment.
MINNESOTA		X		Indemnification Agreements	Minn. Stat. §§ 337.01; 337.02	Exception in cases when owner (or governmental entity) agrees to indemnify for strict liability under environmental laws.
MISSISSIPPI		X		Construction Contracts or Agreements	Miss. Code § 31-5-41	Not applicable to construction bonds or insurance contracts or agreements.
MISSOURI		X		Construction Contracts or Agreements	Mo. Rev. Stat. § 434.100	Not applicable to contracts entered into between state/governmental agencies, and only applicable to contracts entered into after August 28, 1999.
MONTANA		X	X	Construction Contracts	Mont. Rev. Code § 28-2-2111	Contract can require that an insurance policy specific to the project be purchased by a party to the contract.
NEBRASKA			X	Construction Contracts or Agreements	Neb. Rev. Stat. § 25-21; 187	Not applicable to construction bonds or insurance agreements.

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NEVADA	X			Residential Construction Contracts	N.R.S. § AB 125, § 2 (2015).	Effective 2/24/15, indemnification clauses in residential construction contracts requiring subcontractor to indemnify the general contractor/developer for the contractor's negligence (whether active, passive, or intentional) are void and unenforceable as against public policy. However, AB 125 specifically states that its anti-indemnity provision does not apply to indemnity and defense agreements that require a subcontractor to indemnify and defend the general contractor or the developer for claims based on the subcontractor's scope of work.
NEW HAMPSHIRE	X			Indemnification Agreements	N.H. Rev. Stat. §§ 338-A:1; 338-A:2	§ 338-A:1 applies to an architect, engineer, or surveyor. § 338-A:2 applies to construction, installation, alteration, remodeling, repair, demolition, or maintenance contracts.
NEW JERSEY	X			Any Covenant, Promise, Agreement or Understanding in Connection With Construction Contract	N.J. Stat. § 2A:40A-1	Not applicable to validity of insurance policy or workers' compensation issue.
NEW MEXICO			X	Construction Contracts	N.M. Stat. § 56-7-1	Contract can require that party to contract purchase project-specific insurance policy.
NEW YORK		X		Construction Contracts or Agreements	N.Y. Gen. Oblig. Laws § 5-322.1	Not applicable to insurance contract or workers' compensation agreement.
NORTH CAROLINA		X		Construction Contracts or Agreements	N.C. Gen. Stat. § 22B-1	Not applicable to a public utility as an indemnitee, or to contracts entered into by the DOT.
NORTH DAKOTA						No Statute

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OHIO		X		Construction Contracts or Agreements	Ohio Rev. Stat. § 2305.31	Does not affect any person purchasing insurance from an insurance company for his/her own protection. The anti-indemnity statute potentially limits statutory indemnity to contractually required additional insured coverage as well as to indemnity.
OKLAHOMA		X	X	Construction Contracts, Subcontracts, or Agreements	15 Okla. Stat. § 221	Not applicable to requirement that entities purchase project-specific insurance policy.
OREGON		X		Construction Agreements	Or. Rev. Stat. § 30.140	Not applicable to railroads. The anti-indemnity statute limits statutory indemnity to contractually required additional insured coverage as well as to indemnity. Or. Rev. Stat. § 30.140(1) & (2).
PENNSYLVANIA						No statute applicable to standard construction contracts.
RHODE ISLAND		X		Construction Contracts or Agreements	R.I. Gen. Law § 6-34-1	Not applicable to purchasing insurance for an entity's protection, or to construction bonds.
SOUTH CAROLINA	X			Construction Contracts, "Promises" or Agreements	S.C. Code § 32-2-10	Not applicable to any electric utility, electric cooperative, or rail carriers.
SOUTH DAKOTA	X			Construction Contracts or Agreements	S.D. Codified Laws § 56-3-18	N/A
TENNESSEE	X			Construction Contracts or Agreements	Tenn. Code § 62-6-123	Not only applicable to architects and engineers.

STATE	PROHIBITS BROAD INDEMNITY	PROHIBITS INTERMEDIATE INDEMNITY	ADDITIONAL INSURED PROHIBITED	APPLICATION	STATUTE	COMMENTS
TEXAS		X	X		Tex. Ins. Code §§ 151.102, 151.103	Only applicable to registered architects or licensed engineers. Section 151.102, hidden in Tex. Ins. Code, invalidates indemnity in construction contracts. This has small effect in personal injury cases because statute allows indemnity against employer of injured employee. Most construction contracts are written such that employer provides indemnification for injuries to its employees.
UTAH		X		Construction Contracts and Agreements	Utah Code § 13-8-1	Indemnification provisions between owner and construction parties will result in pro-rata proportionate share of fault.
VERMONT						No Statute
VIRGINIA	X			Construction Contracts	Va. Code § 11-4.1	Not applicable to validity of insurance contract or workers' compensation issue.
WASHINGTON		X		Construction Contracts or Agreements	Wash. Rev. Code § 4.24.115	N/A
WEST VIRGINIA	X			Construction Contracts or Agreements	W. Va. Code § 55-8-14	Not applicable to construction bonds or insurance contracts or agreements.
WISCONSIN		X		Construction Contracts, Covenants, or Agreements	Wis. Stat. § 895.447	Not applicable to insurance contracts or workers' compensation issues.
WYOMING						No Statute

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