



Indemnification

Indemnity agreements (also known as “express indemnity” agreements) are one of the most common methods of risk management, so it is important to understand their purpose and use.

What is an Indemnity Agreement?

Indemnity agreements are written contract language which shifts responsibility to pay damages from one party (the “indemnitee”) to another (“indemnitor”) without regard to which party is at fault. It is important that these agreements be in writing, so there is no dispute about the existence or terms of the agreed upon indemnity. Written indemnity agreements are allowed, in varying degrees, in every state.

Common Examples:

- A subcontractor agrees to indemnify the general contractor against claims by third parties that involve the subcontractor’s work.
- A rental car agreement in which the person renting the vehicle agrees to indemnify the rental agency against car accidents occurring while using the vehicle.
- A business owner agrees to indemnify a product supplier against damages arising from misuse of the supplier’s product.

What can be Indemnified Against?

In most states, parties have very few restrictions on the extent to which they can agree to indemnify one another, though generally speaking courts will be reluctant to enforce very broad indemnity clauses unless they are exceptionally clear. Here are a few examples of critical issues that will be determined based upon the wording of the indemnity clause:

- Whether the indemnitor must pay for a claim even where it has done nothing wrong, or whether indemnity will only be required in situations where the indemnitor is at fault.
- Whether indemnity will be reduced where the indemnitee is partially at fault, or whether the indemnity obligation will extend to the indemnitee’s fault.
- Whether the indemnitor must provide the indemnitee with an attorney and pay the indemnitee’s legal costs.
- Whether any obligation to pay the indemnitee’s legal fees starts immediately after a claim is made, or arises only after a court has determined who is at fault.

The wording of the indemnity clause will decide each of the issues listed above, and will govern when and where indemnity must be provided.

What is the Impact of an Indemnity Agreement?

As outlined above, a properly worded indemnity agreement can be exceptionally powerful and can even render meaningless the question of who is at fault in a dispute. It can require the indemnitor to pay for any claims made against the indemnitee and even to pay all of the attorney’s fees the indemnitee has to spend in defending against the claim – even where it turns out the claim is not valid.

In fact, because the impact of an indemnity clause can be so severe and costly, some states have enacted laws that prevent the use of indemnity clauses that are too broad or onerous on the indemnitor. Please consult a local attorney to find out whether your jurisdiction has any such limitations.

Undertaking an indemnity obligation can be quite costly and should not be done lightly. For this reason, it is critical that you read the indemnity clause carefully and make sure you are clear on its language and its meaning.

Tips for Negotiating Indemnity Agreements

Not surprisingly, indemnitors and indemnitees have very different goals when negotiating their indemnitee provisions. Here are some important items to consider when reading and negotiating such agreements:

- Who is being indemnified? Is it only the party in your contract, or does it also include other related people, companies or entities?
- Does the indemnity obligation exist even in situations where the indemnitor is not at fault?
- Is the indemnity agreement limited to damage caused by the indemnitor, or does it also extend to damage caused by third parties or the indemnitee itself?
- Does the indemnity agreement require the indemnitor to pay the indemnitees legal costs? If so, does this obligation begin immediately after the claim is made, or only when (and if) the indemnitor is found to have caused the claim?
- Is there a cap on the amount of indemnity which must be provided (for instance, is indemnity limited to the amount of insurance coverage available)?

The answer to the above questions will usually be decided solely based upon the language of the indemnity agreement (though as mentioned above, some states have specific laws which can limit or bar the use of some particularly onerous indemnity language). Often the scope of the indemnity language can turn upon very subtle differences in wording. For this reason, before negotiating such an agreement, we again recommend you speak with a local attorney familiar with the specific laws in your jurisdiction.

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