

An Introduction to Hold Harmless and Indemnity Agreements

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Transfer of risk is a key component of most contracts. “Indemnify” and “hold harmless” are terms that are commonly seen, and often misunderstood, in contractual agreements. These agreements may be made between companies, individuals or a combination of the two. Helping clients decipher what hold harmless provisions mean and how they are used is a sign of a true insurance professional.

An indemnity or hold harmless agreement offers protection against financial loss for claims resulting from certain activities. For example, a general contractor (GC) may require their subcontractors to hold the GC harmless for damages due to the subcontractor’s activities. A hotel may require a group to hold the hotel harmless while renting the hotel for an event. In most cases, the funding for the hold harmless agreement comes in the form of an insurance policy.

In general, there are three different forms of hold harmless or indemnity agreement: limited, intermediate and broad:

With a limited form, the contractor (Party A) is held proportionally responsible for their liability for negligence or activities. Party A agrees to assume liability for any damages that are due to Party A’s sole negligence and for which Party B may be held vicariously liable.

Under the intermediate form, the contractor (Party A) or subcontractor accepts liability for their own activities and negligence, but not those of others, such as the general contractor (Party B). Party B would still be protected if they are held vicariously liable for the acts of Party A.

In the broad form, one party (Party A) accepts liability for actions of others, including negligence, even if Party A had nothing to do with the activity that caused the damage or claim. There is a generally held perception that these agreements are coercive in nature; i.e. that Party B will not hire Party A without the broad form agreement. For that reason, this type of hold harmless agreement is sometimes determined to be illegal (www.alignedinsuranceinc.com).

Hold harmless and indemnity agreements may be unilateral or mutual. In a unilateral agreement, one party agrees to waive their rights of recourse against another party. For example, subcontractors are routinely asked to hold the general contractor harmless for any and all activities. In a mutual or reciprocal agreement, the parties agree to hold each other harmless. Often found in oil and gas operations, the mutual hold harmless means that each party agrees to pay for damage to their own property and injury to their own personnel, including any consequential losses. This is usually done in cases when there is a low risk of loss, or the parties



are equal in terms of bargaining power (www.itic-insure.com).

The agreements may be created and signed either before or after an event happens. Some insurance policies stipulate that the hold harmless must be signed prior to the event. An exception to this requirement is in the case of a landlord/tenant relationship.

Why might one need a hold harmless or indemnity agreement? The reasons are numerous. Any time you enter into an agreement where there is risk of financial loss, a hold harmless or indemnity agreement may be required: for example, when renting a location for an event, or signing a lease.

Sometimes the terms “indemnify” and “hold harmless” are used interchangeably. This is not always accurate. An agreement to indemnify means that the indemnifier agrees to reimburse the indemnitee for liability that arises out of certain circumstances. The indemnitee may first be required to pay for and provide their own defense and settlement. In contrast, under a true “hold harmless” agreement, the party that is held harmless does not have to respond to a claim – the responsibility is transferred to the party holding them harmless. This can have a significant financial impact on the indemnitee. Careful review of the contract wording is essential to clarify the parties’ responsibilities.

A properly crafted hold harmless agreement is especially important in cases of joint and several liability. Joint and several liability means that one party can be responsible for paying the entire judgement – even if they are only minimally responsible for the damage or injury.

Indemnification and hold harmless are common terms in contractual liability, and may be found in all aspects of society. Helping clients understand their use is another value-added service of a professional insurance agent.

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