

LIMITS OF STANDARD INDEMNITY in Contractor Injury Cases

By Brent Kettelkamp & James A. Junkin

Contracts between hiring clients and contractors often use standard indemnity and hold harmless agreements (IHAs) to allocate liability for worker injuries. However, these agreements often fall short of providing full protection to hiring clients.

IHAs may not provide full protection to hiring clients when significant injuries occur or allegations of client negligence and statutory duty violations arise. This article investigates the limitations of standard IHAs along with state law considerations and practical limitations. It also offers best practices to protect hiring clients from financial and reputational risks.

The widespread use of IHAs in contract agreements reflects a clear intent to distribute risk among the involved parties. Hiring clients attempt to shift the liability for worker injuries onto the contractors who hire them. The legal validity of these arguments depends heavily on local laws and the precise wording of the contractor terms. Hiring clients possess certain nondelegable responsibilities that remain their duty even when they sign an IHA to assign those obligations to a contractor.

The standard use of IHAs as the only protective measure leaves hiring clients vulnerable to financial losses and reputational damage because this approach provides insufficient liability protection. Negligence issues, combined with statutory requirements and contractual interpretation complexities, require thorough scrutiny.

Limitations of Standard Indemnity Clauses

The effectiveness of standard indemnity clauses in protecting hiring clients from liability faces significant limitations due to multiple essential factors.

Violation of Public Policy: A Jurisdictional Perspective

Legal systems maintain a consistent approach by refusing to support indemnity clauses that violate public policy principles. Although jurisdictions define "gross negligence" differently, its meaning consistently reflects a greater level of culpability than that of standard negligence. Different jurisdictions can establish their own standards for gross negligence; one jurisdiction may require proof of reckless disregard for the safety of others, while another may focus on displaying a knowing

disregard for recognized dangers. The differing legal definitions across jurisdictions highlight why legal counsel with knowledge of local precedents is essential.

State Law Differences

Various states maintain indemnity laws, which oversee how IHAs are enforced. Certain states enforce a ban on indemnification clauses that shield parties from their exclusive negligence within specific industries. The interpretation of IHAs becomes more complicated because some states rely on unique state-specific insurance law principles during case decision.

Ambiguity and Interpretation: Importance of Precise Language

Standard IHAs frequently contain wording that lacks precision and clarity. Unclear wording in standard IHAs can lead to multiple interpretations, which can then cause courts to interpret indemnity clauses unfavorably toward the hiring party seeking indemnity. The interpretation of the ambiguous phrase "all claims arising out of work" varies with context and creates state law interpretation problems based on specific circumstances. A properly constructed IHA successfully resolves ambiguity issues and manages potential state law issues.

Statutory Obligations: Nondelegable Duties

Many jurisdictions require hiring clients to maintain nondelegable responsibilities for worker safety. Statutory obligations remain binding to the hiring client because they cannot be transferred to contractors through an IHA. A hiring client may maintain liability when they neglect safety responsibilities, which lead to worker harm even if an IHA exists.

The U.S. enforces worker safety laws and regulations through various agencies, primarily OSHA. The regulations establish employer responsibilities to deliver a safe work environment through proper hazard identification, hazard elimination or control, and worker training. The

hiring client faces liability and possible penalties and citations levied by OSHA when they fail to comply with obligations even if they have a contractor perform the work and sign an IHA.

Contribution & Comparative Negligence: Shared Responsibility

Although an IHA might be enforceable, it does not completely remove the hiring client from liability. The hiring client who works in regions with contribution or comparative negligence laws may have to share responsibility for a worker's injuries or death whenever their behavior played a role in causing the incident. The hiring client could face financial obligations because shared liability under contribution or comparative negligence principles reduces the IHA's complete protective scope. Fault allocation differs by jurisdiction since some jurisdictions use a pure comparative negligence system whereas others use a modified comparative negligence system, which prohibits a plaintiff from recovering damages if their liability surpasses a specific threshold.

Insurance Coverage: Gaps & Exclusions

The existence of an IHA does not guarantee insurance coverage for the client. Insurance policies frequently contain exclusions limiting coverage for liability assumed under indemnity agreements, especially for gross negligence or intentional acts.

Hiring clients should consider examining their own insurance policies as well as their contractors to ascertain the extent of coverage provided. While there may be a contractual obligation to defend and indemnify under the IHA between the parties, the contractor's (or the hiring client's) insurance coverage may not cover or may specifically exclude the same depending on the circumstances. Failure to review insurance coverages can leave the hiring client financially exposed even if the IHA is valid and enforceable.

PRACTICAL STEPS TO REDUCE LIABILITY RISK

Mitigation Considerations

IHHAs assist with liability distribution but do not provide complete protection against liability claims related to contractor worker injuries. Hiring clients should implement multiple strategies to adequately protect themselves from this particular risk.

Extensive Contractor Prequalification

Verify contractor qualifications prior to awarding work. This assessment, which is usually performed using software as a solution technology, involves reviewing the contractor's financial stability, past project experience, safety record, safety policies and procedures, and worker training. The goal of prequalification is to ensure that only qualified contractors are considered, thereby reducing the risk of project delays, poor-quality workmanship and workplace safety issues.

Proactive Risk Management

The establishment of thorough safety protocols together with stringent adherence checks ensures incident prevention while simultaneously minimizing liability. The procedure requires examining potential hazards and risks and establishing controls during both prework planning and the active work phase. The strategy focuses on identifying risks early to enable preventive measures before an incident occurs. Implementing continuous monitoring and early intervention through proactive risk management strengthens decision-making and strategic planning while building organizational resilience and adaptability to unexpected challenges and reducing costs related to reputational damage and production losses.

Comprehensive Legal Review

Hire specialized legal experts in construction, oil and gas, occupational environmental, health and safety, and contract law to create or evaluate IHHAs for legal validity and jurisdictional compliance.

Precise Contractual Language

The IHHA language should be revised to include clear definitions of indemnification limits to prevent legal misunderstandings and state law conflicts.

Insurance Due Diligence

Both the contractor's and the hiring client's insurance policies must be thoroughly examined to confirm sufficient insurance coverage for assumed IHHA liabilities. The IHHA transfers risks

• **Vet contractors thoroughly.** Conduct prequalification checks on financial stability, safety records, training and past performance before awarding work.

• **Strengthen risk management.** Implement proactive safety protocols, hazard assessments, and continuous monitoring to prevent incidents and reduce liability.

• **Engage legal specialists.** Retain attorneys with expertise in construction, safety and contract law to draft or review indemnity clauses for jurisdictional compliance.

• **Use precise contract language.** Define indemnification limits clearly to avoid ambiguity, misinterpretation and unfavorable court rulings.

• **Verify insurance coverage.** Review both contractor and client insurance policies, including subcontractor coverage, to ensure that IHHA liabilities are properly insured.

• **Review and update agreements regularly.** Reassess IHHAs to align with evolving laws, case precedents and business conditions to maintain enforceability and protection.

from the hiring client to the contractor, which necessitates that the contractor maintains sufficient insurance for claim coverage to protect the hiring client against financial losses from incidents or damages. It is critical to examine subcontractor insurance policies because subcontractors create liability risks for the contractor and hiring clients.

Having properly insured subcontractors protects the entire project while strengthening the total risk management strategy. The hiring client protects against liability and prevents expensive disputes while enhancing workplace safety when all parties maintain proper insurance coverage.

Regular Updates

IHHAs must be consistently reviewed and updated to remain aligned with new laws and legal interpretations while maintaining their effectiveness and legal compliance. The terms of these agreements distribute risks and responsibility between the involved parties while ongoing changes in legislation, case law, or business conditions might make existing terms insufficient or excessively burdensome.

Hiring clients who regularly examine IHHAs can detect necessary updates that protect their interests by aligning with current practices and minimizing risk exposure. Periodic reviews between hiring clients and contractors establish better communication and understanding, which leads to stronger relationships and less legal disputes over unclear or outdated terms.

Conclusion

A standard IHHA alone may not provide adequate protection for hiring clients. Inconsistent case law and legislation across varying states coupled with ambiguous contractual language, and the persistence of nondelegable safety responsibilities can leave unmitigated risk

for hiring clients. Effective risk management requires a multifaceted approach, moving beyond simple liability transfer. Active contractor management helps hiring clients protect their reputation and avoid major financial losses and potential liability by emphasizing safety.

Safety professionals must be prepared to advise employers on these complex legal and practical issues, ensuring that safety protocols and risk management practices minimize potential liabilities and prioritize worker well-being within their contractor networks. By taking proactive and comprehensive measures, safety professionals and hiring clients can substantially reduce their legal exposure while fostering a safer and more responsible work environment. **PSJ**

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