

Considerations for Drafting Contractual Indemnification Provisions

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As many may attest following the last 18 months of COVID-19-related closures, contractual provisions labeled with legal terms like “force majeure” are often and unfortunately glossed over during deal negotiation as “standard” or “boilerplate.” In fact, these concepts require unique scrutiny as they directly impact big-ticket, future liabilities. This article highlights another such provision with arguably even greater importance: the indemnification clause.

The term “indemnity” simply means “compensation for harm or loss.” A contract may create an indemnity as an obligation to reimburse the other party for certain, enumerated liabilities. Once the parties execute the contract, Nevada courts must strictly construe the indemnification clause and enforce it in accordance with the terms of the contracting parties’ agreement. Therefore, planning, drafting and negotiating are paramount. Below is a list of 10 key points (in no particular order) to consider when your contract involves indemnification.

1. Get your risk manager involved, as the indemnification and insurance provisions often interrelate. Consider whether your insurance covers any required indemnity.
2. Consider which parties are implicated by the indemnity. For example, if the agreement is a lease, an indemnity benefitting the landlord might also indemnify its lenders and affiliates, while the scope of the obligation might cover acts not only of the tenant but also of the tenant’s agents and licensees. Nonetheless, keep in mind that only the parties, each of their assigns and enumerated third-party beneficiaries may enforce the contract.
3. Understand the survival period of the indemnification obligation as compared to the statute of limitations for potential claims arising under the contract. For example, the clause might provide that the indemnification obligation lasts for one year following the expiration of the contract; however, the underlying action might have a five-year statute of limitations.
4. Consider liability limitations, for example, a cap on total coverage or a carve-out for special or consequential damages. Some

contracts might also include a threshold of damages that must be reached before triggering the indemnification obligation (i.e., a basket) in addition to a cap on the total amount recoverable.

5. Understand Nevada law and its effect on your contract. For example, in Nevada, an indemnity will only extend to a party’s own negligence if doing so is explicitly expressed in the contract. In other words, a general provision indemnifying the indemnitee “against any and all claims,” standing alone, is not sufficient. Further, the parties should consider whether other Nevada law prohibits the contemplated indemnity by statute or case law.
6. Consider whether to include the phrase “defend and hold harmless,” which goes beyond the simple indemnity. Specifically, the duty to defend is broader than the duty to indemnify, and may result in liability for costs of an action even if the indemnitor prevails. Similarly, an obligation to hold the other party harmless may include an obligation to reimburse the indemnitee for its attorneys’ fees and an agreement by the indemnitor not to seek any damages for its own losses.
7. Consider carve-outs from the indemnity for the indemnitee’s own gross negligence or misconduct and for any indemnification obligations burdening the other party.
8. If there is more than one indemnitor, consider making the indemnitors jointly and severally liable for the obligation. If your client is an indemnitor, consider a separate contribution agreement allocating liability as between the indemnitors.
9. Understand how the indemnity functions in the context of the contract generally. For example, is there one indemnification provision generally governing breaches or have specific indemnities been carved out in various sections, and if so, are you covered where you need to be?
10. Consider adding procedures to your indemnification provision to govern how a party provides notice triggering the indemnification obligation or rules governing defense of claims, if applicable (for example, does the party choose its own counsel). 🌿



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