

Anti-Indemnity Statutes in the 50 States: 2020

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Introduction

Anti-Indemnity laws are important to construction subcontractors because too often contractors and owners shift their own liability and risk to the subcontractors. Specifically, “hold harmless” and “additional insured” provisions in a construction subcontract seek to hold the subcontractor accountable for worksite accidents or other losses that are not the fault of the subcontractor.

These “hold harmless” and “additional insured” provisions are problematic to subcontractors because they may unfairly shift the financial responsibility for claims to the subcontractor or its insurance company. As a result, a party who is indemnified by the subcontractor may use less care to avoid injury or loss because the indemnified party is not liable for its own actions. This carelessness may result in more accidents on the worksite that could have been avoided.

When a subcontractor is required to purchase insurance naming the contractor, owner or others as an "additional insured," it is the subcontractor who ultimately pays higher insurance premiums when a loss is covered under the policy, even when the subcontractor was not negligent. The party who is truly responsible for the loss suffers no increased cost, while the subcontractor bears all of the burden.

Many states have enacted legislation that address at least some of the issues in shifting the burden of liability to a subcontractor. Forty-three states have some form of law which prohibits a construction contract that requires a subcontractor to indemnify another party for its negligence (but some of these states limit the application of the law, for example, only to public projects). Only 28 of those states prohibit a subcontractor from indemnifying another party for its sole or *partial* fault, meaning 15 of the states with some form of anti-indemnity legislation only prohibit a subcontractor from indemnifying another party for its *sole* fault.

Even fewer states have addressed the additional insured dilemma so far. Only six of the states prohibit a party from requiring another party to name it as an additional insured under a policy of insurance, but the trend is moving in this direction.

The manual is intended to serve as a resource for identifying which states have anti-indemnity legislation. It indicates which states prohibit indemnity for partial fault or sole fault of the indemnified party. It also indicates in which states a party is prohibited from requiring a subcontractor to name it as an additional insured, thereby closing the additional insured loophole.

This manual is not intended to provide legal advice, and should an issue arise, the subcontractor should contact its legal counsel before acting on the information provided herein.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Alabama				No statute.
Alaska	✓			Alaska Stat. § 45.45.900. Exception for hazardous substances.
Arizona	✓ (private work)	✓ (public work)	✓ (public work)	Ariz. Rev. Stat. §§ 32-1159, 34-226, 41-2586. Exception for all three for entry onto adjacent land. §§ 34-226 and 41-2586, limit indemnity on public work projects to only those damages caused by the negligence, recklessness, or intentional wrongful conduct of the contractor, subcontractor or design professional, and any express duty to defend is prohibited.
Arkansas	✓			Ark. Code §§ 4-56-104 and 22-9-214.
California	✓	✓		Civ. Code §§ 2782 and 2782.05 (effective with Contracts entered after Jan. 1, 2013). § 2782.5 provides an exception for “the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract.”
Colorado	✓	✓		Colo. Rev. Stat. §§ 13-50.5-102; 13-21-111.5. Statutes do not apply to breaches of trust and similar fiduciary duties.
Connecticut		✓		Conn. Gen. Stat. § 52-572k.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Delaware		✓	See comments.	Del. Code, Title 6, § 2704. See <i>Chrysler v. Merrell & Garaguso</i> , 796 A.2d 648 (Del. 2002) (a.i. requirement “may, under certain circumstances, be unenforceable,” but <i>endorsement</i> is enforceable).
District of Columbia				No statutes. See <i>N.P.P. Contractors, Inc. v. John Canning & Co.</i> , 715 A.2d 139, 142 (D.C. 1998) (indemnification contract allowed).
Florida		✓ (public work)		Fla. Stat. § 725.06 requires only a monetary limitation and reproduction in bid documents and specs.
Georgia	✓		✓	Ga. Code § 13-8-2. Exception for obligations under workers’ compensation agreements and similar coverage or insurance related to workers’ compensation.
Hawaii	✓			Hawaii Rev. Stat. § 431:10-222. Inapplicable to workers’ compensation claims.
Idaho	✓			Idaho Rev. Stat. § 29-114.
Illinois		✓		Ill. Compiled Stat., 740 I.L.C.S. § 35/0.01, <i>et seq.</i> Inapplicable to construction bonds and insurance contracts or agreements.
Indiana	✓			Ind. Code § 26-2-5. Exceptions for “dangerous instrumentalities” and “highway contracts.”

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Iowa		✓		Iowa Code § 537A.5. Inapplicable to “any obligation of strict liability otherwise imposed by law.”
Kansas		✓	✓	Kansas Stat. § 16-121. Statute voids promises on 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		✓		Kentucky Rev. Stat. § 371.180. Applies to contracts entered into after June 20, 2005.
Louisiana		✓ (public work)		La. Rev. Stat. § 38:2216.G. Only protects prime contractors on public work. <u>Compare</u> the Louisiana Oilfield Indemnity Act, La. Rev. Stat. Ann. § 9:2780, applied in <i>Babineaux v. Reading & Bates Drilling</i> , 806 F.2d 1282 (5th Cir. 1987) (both “hold harmless” and “additional insured” void).
Maine				No statute.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Maryland	✓			Md. Code. Ann., Cts. & Jud. Proc. § 5-401. Inapplicable to insurance contract and workers' compensation issues.
Massachusetts	✓			Mass. Gen. Laws, ch. 149, § 29C. Voids any provision which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, sub-subs or agents.
Michigan	✓			Mich. Comp. Laws § 691.991.
Minnesota		✓		Minn. Stat. § 337.02. Indemnification agreements in construction contracts are unenforceable. Two exceptions: (i) Underlying injury or damage is due to negligent act (including breach of specific contractual duty). (ii) Owner, responsible party, or governmental entity agrees to indemnify contractor directly or another contractor for strict liability environmental laws.
Mississippi		✓		Miss. Code § 31-5-41. Inapplicable to construction bonds and insurance agreements.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Missouri		✓		Mo. Rev. Stat. § 434.100. Nine exceptions, including contracts between state or government agencies.
Montana		✓	✓	Mont. Rev. Code § 28-2-2111. Two exceptions: (i) For negligent, reckless, or intentional conduct of a third party or indemnifying party. (ii) Indemnity of a surety.
Nebraska		✓		Neb. Rev. Stat. § 25-21,187.
Nevada	✓			Neb. Rev. Stat. § 40.693. Effective 2/24/15. Indemnification clauses in residential construction contracts requiring subcontractor to indemnify the general contractor for the contractor's negligence (whether active, passive, or intentional) are void and unenforceable as against public policy. The statute 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		✓		N.H. Rev. Stat. §§ 338-A:1 (design professionals) and 338-A:2 (construction contracts generally).

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
New Jersey	✓			N.J. Stat. § 2A:40A-1. Inapplicable to workers' compensation issues.
New Mexico		✓	✓	N.M. Stat. § 56-7-1. Prohibits requirements to "insure or defend," but authorizes OCP, PMPL.
New York		✓		N.Y. Gen. Oblig. Laws § 5-322.1. Contractor cannot require subcontractor to indemnify the contractor for contractor's negligence but contractor may require sub to indemnify contractor from negligence of sub and other trades.
North Carolina		✓		N.C. Gen. Stat. § 22B-1.
North Dakota				No statute. <i>But see</i> N.D.Cent.Code 9-08-02.1 prevents owner shifting design risk.
Ohio		✓	See comments.	Ohio Rev. Code § 2305.31. <i>Compare</i> <i>Buckeye Union Ins. v. Zavarella Bros.</i> , 699 N.E.2d 127 (Ohio 8th App. 1997) (a.i. barred) and <i>Stickovich v. Cleveland</i> , 757 N.E.2d 50, 61 (Ohio 8th App. 2001) (a.i. permitted).
Oklahoma		✓	✓	Okla. Stat. § 15-221.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Oregon		✓	✓	Or. Rev. Stat. § 30.140. Prohibits subcontractor's "surety or insurer" from indemnifying another's negligence. <i>Walsh Construction Co. v. Mutual of Enumclaw</i> , 104 P.3d 1146 (Or. 2005).
Pennsylvania				Pa. Stat., Title 68, § 491, prohibits indemnity of design professionals.
Rhode Island		✓		R.I. Gen. Laws § 6-34-1. Inapplicable to construction bonds.
South Carolina	✓			S.C. Code § 32-2-10.
South Dakota	✓			S.D. Codified Laws § 56-3-18.
Tennessee	✓			Tenn. Code § 62-6-123.
Texas		✓ (See Comments)	✓ (See Comments)	Tex. Insurance Code Ch. § 151. Exception for employee claim § 151.103; see § 151.105 for exclusions; Civ. P&R Code § 130.002 only prohibits indemnity of design professionals.
Utah		✓		Utah Code § 13-8-1. Exception permits indemnity of owner; fault of the owner is apportioned among the parties pro rata.
Vermont				No statute.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Virginia	✓			Va. Code § 11-4.1.
Washington		✓		Wash. Rev. Code § 4.24.115.
West Virginia	✓			W.Va. Code § 55-8-14. Inapplicable to construction bonds.
Wisconsin		✓		Wis. Stat. § 895.447. Inapplicable to insurance contract or workers' compensation plan.
Wyoming				No statute. <i>But see</i> Wyo. Stat. § 30-1-131 voids covenants or promises pertaining to "any well for oil, gas or water, or mine for any mineral" which purport to indemnify the indemnitee from loss or liability caused by his or her own negligence.