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## Anti-Indemnity Statutes in the 50 States

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## Acknowledgments

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# Preface

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Anti-Indemnity legislation is important to 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-one 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 twenty-seven of those states prohibit a subcontractor from indemnifying another party for its sole or

*partial* fault, meaning fourteen 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 Subcontractors Chart of Anti-Indemnity Statutes is intended to serve as a resource for identifying which states have anti-indemnity legislation. The Chart indicates which states prohibit indemnity for partial fault or sole fault of the indemnified party. The Chart 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.

The Chart 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 in the Chart.

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 entry onto adjacent land. Recent amendments to § 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, 22-9-214
California	✓	✓		Civ. Code §§ 2782 and Civil Code §§ 2782.05 (effective with Contracts entered after January 1, 2013).
Colorado		✓	✓	Colo. Rev. Stat. §§ 13-50.5-102, 13-21-111.5 [SB 87 (2007)].
Connecticut		✓		Conn. Gen. Stat. § 52-572k (P.A. 01-155).
Delaware		✓	See comments.	Del. Code, Title 6, § 2704. <u>See Chrysler v. Merrell &amp; Garaguso</u> , 796 A.2d 648 (Del. 2002) (a.i. <i>requirement</i> “may, under certain circumstances, be unenforceable,” but <i>endorsement</i> is enforceable).
D.C.				No statute; <i>N.P.P. Contractors, Inc. v. John Canning &amp; Co.</i> , 715 A.2d 139, 142 (D.C. 1998) (indemnification contract allowed).
Florida		✓ (public work)		For private work, Fla. Stat. § 725.06 [SB 428 (2001)] requires only a monetary limitation and reproduction in bid documents and specs.
Georgia	✓		✓	Ga. Code § 13-8-2 [HB 136 (2007)].
Hawaii	✓			Hawaii Rev. Stat. § 431:10-222.
Idaho	✓			Idaho Rev. Stat. § 29-114.
Illinois		✓		Ill. Compiled Stat., 740 ILCS 35/1-3.
Indiana	✓			Ind. Code § 26-2-5, “dangerous instrumentality” exception.
Iowa		✓		Iowa Code § 537A.5.
Kansas		✓		Kansas Stat. § 16-121 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 [HB 449 (2005)].
Louisiana		✓ (but see comments)		La. Rev. Stat. § 38:2216.G only protects primes on public works. <u>Compare</u> the Louisiana Oilfield Indemnity Act, La. Rev. Stat. Ann. § 9:2780, applied in <u>Babineaux v. Reading &amp; Bates Drilling</u> , 806 F.2d 1282 (5 <sup>th</sup> Cir. 1987) (both “hold harmless” and “additional insured” void).
Maine				No statute.
Maryland	✓			Md. Code. Ann., Cts. & Jud. Proc. §5-401 (2008).

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Massachusetts	✓ But see comments			Mass. Gen. Laws, ch. 149, § 29C as written voids any provision which requires subcontractor to indemnify for injury or damage not caused by the subcontractor or his employees, sub-subs, etc. However, a recent court decision upheld a provision which required sub to indemnify for injury or damage “arising out of or in consequence of” his work, because the court found those words to be the equivalent of “caused by”. The indemnification standard has thus been lowered to something less than negligence or proximate causation, but how much lower is not clear.
Michigan	✓			Mich. Comp. Laws § 691.991.
Minnesota		✓		Minn. Stat. §§ 337.01, 337.02. Exception permits owners to indemnify environmental liabilities. Allows contract provision requiring sub to insure general and owner for own fault.
Mississippi		✓		Miss. Code § 31-5-41.
Missouri		✓		Mo. Rev. Stat. § 434.100. Expressly allows additional insured.
Montana		✓	✓	Mont. Rev. Code § 28-2-2111 prohibits requirements to “insure or defend,” but authorizes OCP, PMPL (for private construction contracts). See Mont. Rev. Code § 18-2-124 for equivalent provision governing public contracts.
Nebraska		✓		Neb. Rev. Stat. § 25-21,187.
Nevada				No statute. See <u>Reyburn Lawn &amp; Landscape Designers, Inc. v. Plaster Development Co., Inc.</u> , 255 P.3d 268 (Nev. 2011) (“while the parties are free to contractually agree to indemnify another for its own negligence, ‘an express or explicit reference to the indemnitee’s own negligence is required.’ Therefore, ‘contracts purporting to indemnify a party against its own negligence will only be enforced if they clearly express such an intent, and a general provision indemnifying the indemnitee ‘against any and all claims,’ standing alone, is not sufficient.’”)
New Hampshire		✓		N.H. Rev. Stat. §§ 338-A:1 (design professionals) and 338-A:2 (construction contracts generally)
New Jersey	✓			N.J. Stat. § 2A:40A-1.
New Mexico		✓		N.M. Stat. § 56-7-1 [SB 280 (2003)] 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. However, statute does not prohibit contractor from requiring subcontractor to indemnify contractor from negligence of subcontractor and other trades. Thus, claims “arising out of” subcontractor’s work may require the subcontractor to indemnify the contractor, even if caused by the negligence of another subcontractor. Note, also, N.Y. Labor Law §§240 and 241 holds owner and contractors strictly liable for injuries sustained for falls from elevated levels, and are subject to indemnity provisions without regard to negligence.)
North Carolina		✓		N.C. Gen. Stat. § 22B-1.

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
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 Buckeye Union Ins. v. Zavarella Bros.</i> , 699 N.E.2d 127 (Ohio 8 <sup>th</sup> App. 1997) (a.i. barred) and <i>Stickovich v. Cleveland</i> , 757 N.E. 2d 50, 61 (Ohio 8 <sup>th</sup> App. 2001) (a.i. permitted).
Oklahoma		✓	✓	Okla. Stat. § 15-221 [S.B. 324 (2006)].
Oregon		✓	✓	Or. Rev. Stat. § 30.140 prohibits subcontractor's "surety or insurer" from indemnifying another's negligence. <u>Walsh Construction</u> , 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.
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.
Vermont				No statute.
Virginia	✓			Va. Code § 11-4.1.
Washington		✓		Wash. Rev. Code § 4.24.115.
West Virginia	✓			W.Va. Code § 55-8-14.
Wisconsin				Wis. Stat. § 895.447 provides no protection; see <u>Gerdmann v. U.S. Fire Ins. Co.</u> , 350 N.W.2d 730 (Ct. App. 1984).
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.