

Contracts – Indemnification Clause with Hold Harmless and Defense Provisions

OVERVIEW OF ISSUE

Contracts involve a promise to do something, to provide goods or services. Indemnification which includes defense and hold harmless provisions are fundamental to well-drafted contracts since these clauses stipulate which party provides compensation for loss that may result.

This Risk Note addresses the indemnification clause while another risk note addresses insurance clauses and sample wordings.

HIROC recommends subscribers have their corporate counsel (and privacy officer if personal health information is involved) review all contracts.

Refer to related Risk Notes for further details:

- [Contracts – Important Clauses](#)
- [Contracts – Insurance Clauses](#)

KEY POINTS

- To indemnify is to make someone or an entity ‘whole’ after a loss
- To be held ‘harmless’ means to be free from blame
- There are three typical parts of an indemnification clause they are to: indemnify, defend and hold harmless the other party

THINGS TO CONSIDER

Definitions

- **Indemnification** – a contract provision where one (the indemnifier) agrees to cover (or assume) the loss, damage or liability suffered by another party (the indemnitee).
- **Hold Harmless** – the hold harmless provision of the indemnification clause absolves the second party of any blame for any loss caused by the first party’s negligence, after the loss has been determined by litigation, arbitration or settlement.
- **Defend** – The indemnifier agrees to pay the other party’s legal expenses as it defends a claim made against it by a third party.

Indemnification Clauses

In addition to insurance provisions, indemnification with hold harmless and defense provisions should appear in all contracts and be reviewed carefully (refer to Contracts – Insurance Clauses Risk Note for details).

Healthcare Organization Risk Mitigation Strategies

Indemnification Clause

- If the provider of goods and services reneges on the contractual obligations, and the other party suffers

a loss, the provider of the goods or services can be obligated, by the indemnity clause, to make good on the promise or compensate the other party for subsequent losses.

- The indemnity clause should clearly identify the party responsible for the payment of a loss. If the parties have purchased insurance, they transfer the responsibility of indemnifying the aggrieved party to the insurance company.
- Watch for a unilateral indemnification clause where only one party is being indemnified.
- Watch for expansive indemnity clauses since this may obligate the indemnifier to remunerate for losses it is not intending to pay – example, “will indemnify for all losses and damages, notwithstanding the cause of loss”. The insured cannot rely solely on insurance to pay for damages it has agreed to, as the insurance policy may have exclusions and stipulations that limit the payment.
- Indemnification clauses should include expenses, such as legal expenses, in addition to requiring compensation for claims, losses and damages.

Hold Harmless Clause

- The indemnification clause usually includes the hold harmless clause.
- The indemnification clause must be mutual.

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Sample of a Mutual Indemnification

SAMPLE ONLY: this may not be appropriate for some contracts and should be customized.

The **(name of the healthcare organization)** agrees to defend, indemnify and save **(the other party)** harmless from all loss, cost, expense, judgment or damage on account of injury to persons including death or damage to property, in any way caused by the negligence of the healthcare organization, its servants, agents or employees related to or arising out of programs or other matters to which this agreement pertains, together with all legal expenses and costs incurred by the (the other party) in defending any legal action pertaining to the above.

The **(name of the other party)** agrees to defend, indemnify and save the **(name of the healthcare organization)** harmless from all loss, cost, expense, judgment or damage on account of injury to persons including death or damage to property, in any way caused by the negligence of the **(other party)**, its servants, agents, or employees related to or arising out of programs or other matters to which this agreement pertains, together with all legal expenses and costs incurred by the hospital in defending any legal action pertaining to the above.



REFERENCES

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