

Legal Scope

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Workers' Compensation and Indemnity

Indemnity terms are frequently scrutinized in construction contracts. I often receive questions pertaining to the relationship between indemnity and workers' compensation. A typical clause might state something similar to the following, which is found in the AIA A201-2007 General Conditions:

[T]he indemnification obligation . . . shall not be limited by a limitation on amount or type of damages, compensation or benefits payable . . . under workers' compensation acts, disability benefit acts or other employee benefit acts.

Sometimes, versions of this paragraph use language similar to a waiver.

Clauses of this nature are addressing the relationships between two separate legal concepts: contractual indemnity, versus workers' compensation immunity from claims.

As an initial caveat, workers' compensation is a state specific program, and each state has its own nuances. Still, generally, in most states there are rules providing that if an

employee is injured and receives the workers' compensation proceeds, then, the employee is prohibited from suing the employer for the injury. In other words, by accepting the workers' compensation benefits, the employer receives immunity from the employee's potential claim. Most construction companies are familiar with this concept.

But these statutes usually do not prohibit the employee from filing a lawsuit against other entities who are not the employer.* Thus, employees who have been injured and received workers' compensation often file a suit against other entities, such as other trade contractors on site or the owner of the property.

Contractual indemnity, on the other hand, is a separate legal concept. Construction contracts often mandate that one party covers the defense of another party. These indemnity clauses do not necessarily involve workers' compensation. The purpose of the contract clause quoted above, is to clarify that if an event triggering indemnification occurs, the fact that one party is shielded from liability due to the workers' compensation laws, does not prevent the indemnity clause from still being triggered. In other words—the employer may be immune from a suit by the employee; however, if a lawsuit is filed against other parties, then, those parties may still seek indemnity from the employer under the contract.

Contract clauses addressing the relationship between indemnity and workers' compensation immunity are relatively common and non-controversial, as indicated by the fact that the AIA standard terms include the clause. Lastly, just because a lawsuit is filed, and indemnity is sought, does not mean that defenses to the indemnity claim or underlying claim are non-existent. Each case is fact specific; and this article merely clarifies that the highlighted contract clause is not a waiver of workers' compensation immunity; it merely is a clause to preserve contractual indemnity in event that workers' compensation is triggered.

Remember, when negotiating contract terms, it is prudent to seek advice of counsel and your insurance representative early and often.

* The definition of an employer, or statutory employer, can affect the ability of a claimant to file suit, and that is a separate issue in itself.

The Numbers:

3.7%

- The U.S. unemployment rate. (seasonally adjusted), held steady at 3.7%.
- Construction employment added 30,000 in October 2018.
- Approximately half the construction employment gain was in residential specialty trade contractors.

Source(s): BLS, The Employment Situation—Oct. 2018 (Nov. 2, 2018).



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Legal Scope is advertising material written by Jeffrey Bright, an attorney licensed in Pennsylvania and Maryland. For more information, contact Bright Law Firm. This newsletter is not legal advice. Unlike this newsletter, legal advice is specifically tailored to the facts, law and objectives unique to each circumstance.

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