
TRENDING TOPICS IN COMMERCIAL TRANSACTIONS AND LITIGATION

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AGENDA

Corporate
Transparency
Act (CTA)

Common Types
of Contract
Disputes

How to Prevent
Disputes in
Contract
Drafting

CORPORATE TRANSPARENCY ACT

CORPORATE TRANSPARENCY ACT

Background

- The CTA was enacted to trace the transfer of illegal money and to halt terrorism funding.

Filing deadlines

- Legal Entities formed before January 1, 2024 must file by 1/1/25
- Legal Entities formed in 2024, must file within 90 days of registration
- Legal Entities formed on or after January 1, 2025 must file within 30 days of registration

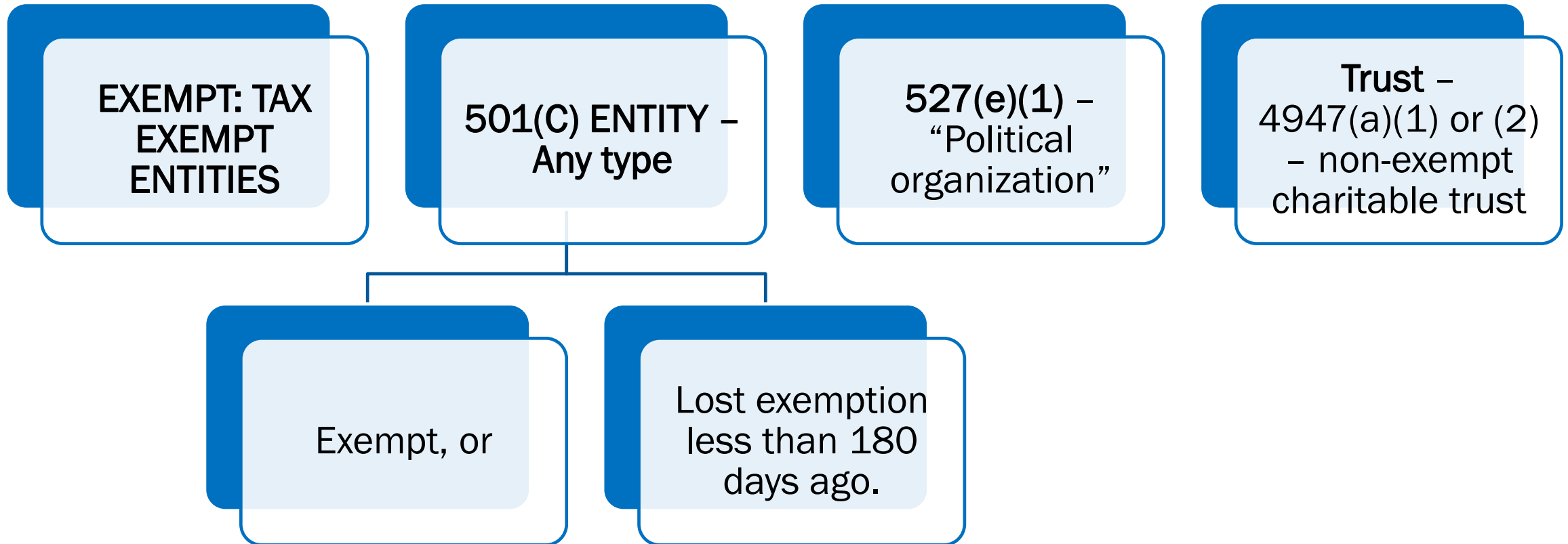
CORPORATE TRANSPARENCY ACT – REPORTING AND EXEMPTIONS

➤ Reporting:

- How to determine if you are required to report.
- Are you a covered entity? Entities created by federal or state registration (includes most Corporations, LLCs, Limited Partnerships, some trusts) that do not meet an exemption.
- **Exemptions:** Twenty-three (23) exemptions.



CORPORATE TRANSPARENCY ACT – EXEMPTIONS CONT.



CORPORATE TRANSPARENCY ACT – EXEMPTIONS CONT.



➤ Large Operating Company

- ❖ More than 20 FT employees in the US
- ❖ Operates in the US
- ❖ Prior year tax return is greater than \$5 million in gross receipts/sales – total/USA
- ❖ Filed 1120, 1065, or 1120S
- ❖ Lease or own real property in the US for business

WHO IS DISCLOSED? APPLICANTS AND “OWNERS”

Effective January 1, 2024 – Applicants who filed the registration for the entity.

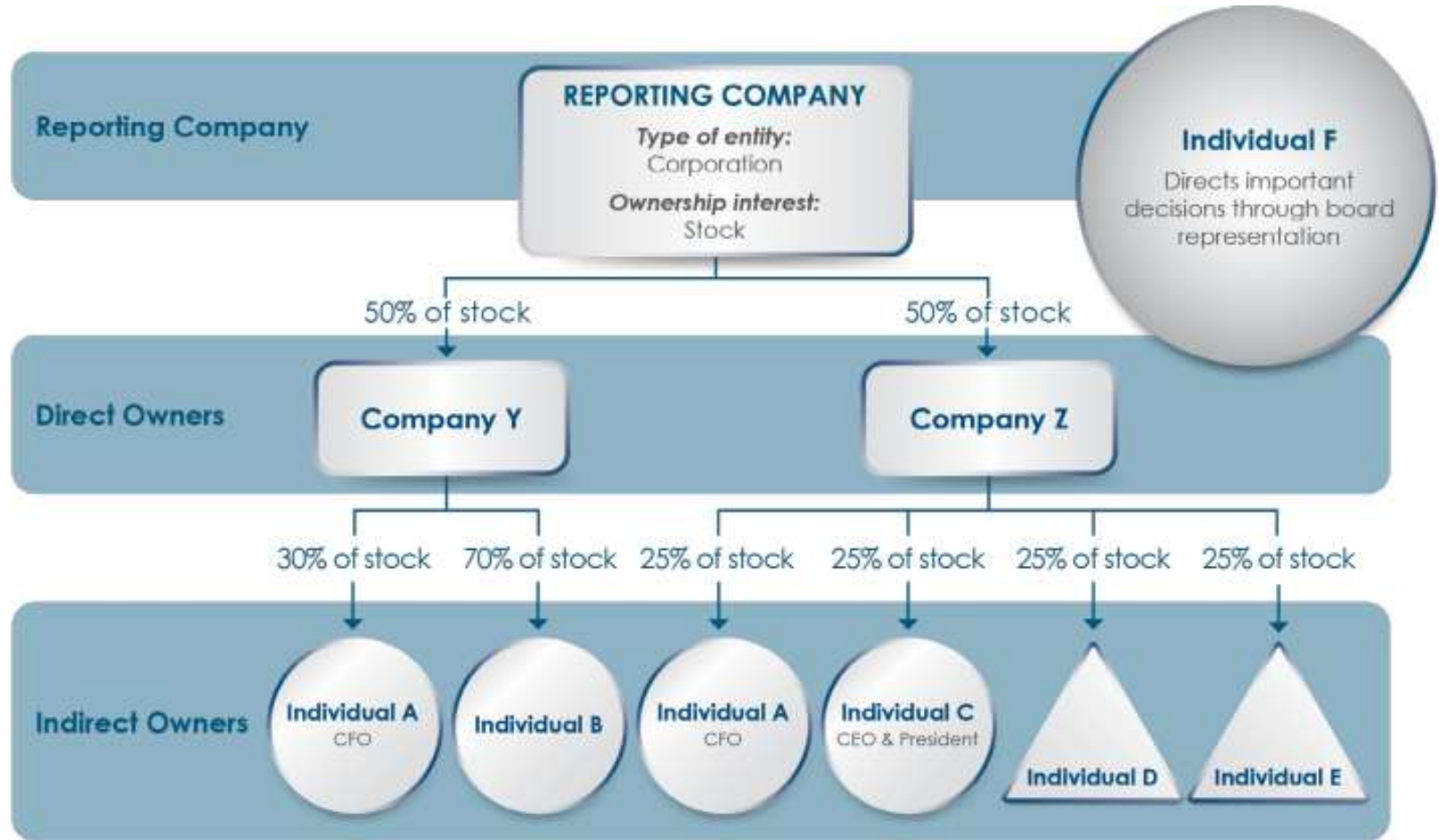
Beneficial owners are individuals who own 25% or more of the entity

- This can be direct or indirect ownership. Review chain of ownership, even if in trust.
- Can be any type of ownership: Profit, Capital, Voting, Convertible Instruments, Options, Privileged (put and call)
- Must be a true owner (not a nominee, custodian, agent)

Persons who exercise Substantial Control

Senior Officers (CEO, COO, CFO, General Counsel)

BENEFICIAL OWNER ANALYSIS



INFORMATION NEEDED TO FILE FOR ENTITY

Name of Entity

Entity Identifier – EIN, SSN (Single Member LLC)

Business Address

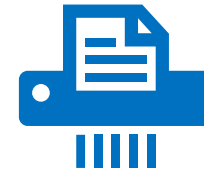
INFORMATION NEEDED FOR BENEFICIAL OWNERS



Full legal name, date of birth,
residential street address



Unique identification supported
by current passport, driver's
license, state identification



Attachment of image – not more
than 4 MB

May be jpg, jpeg, png, pdf

Applicant attorney – use business

FILING PROCESS

FinCEN Portal:
Open to
Anyone!

<https://secure.login.gov/>

Corrections –
Short window
to
correct/amend

Optional: Create
personal **FinCEN ID** –
Preloaded 12 Digit
Personal Identity –
Example: # 1234-5678–
9012

Online – No
paper forms.
But must have
basic info.

FAILURE TO COMPLY – VERY COSTLY

- Civil = \$591/day
- Criminal (Reporting violations) - \$10,000 or 2-year imprisonment (or both).
- Criminal (Disclosure and use violations) - \$250,000 or 5-year imprisonment (or both).
- Senior Officers- Liable for the Failure
- Fines double if another law is violated or if there is a pattern of any illegal activity involving more than \$100,000 in a 12-month period.
- Generally, you have thirty (30) days to correct an error.
- At present, you have ninety (90) days to correct without penalty.



COMMON TYPES OF CONTRACT DISPUTES

COMMON TYPES OF CONTRACT DISPUTES

- Employment Agreements
- Construction Contracts
- Commercial Leases
- Sale of Goods Contracts
- Operating Agreements/
Bylaws/Shareholder Agreements
 - ❑ Two-member agreements without proper protections
 - ❑ No agreements



EMPLOYMENT AGREEMENT DISPUTES

Restrictive Covenants

- Non-Compete Agreement
- Non-Solicitation Agreement
- Non-Disclosure of Confidential Information

CONSTRUCTION CONTRACT DISPUTES

- Prompt payment
- Insurance Coverages Limits
- Indemnification
- Additional Insured
- Dispute Resolution





COMMERCIAL LEASE DISPUTES

- Maintenance and Repairs
- Common Area Maintenance (“CAM”) Charges
- Withholding of Rent
- Options to Renew



“Aren’t you glad we had this meeting to resolve our conflict?”

SALE OF GOODS DISPUTES

- Delivery Issues
- Quality Issues
- Payment Issues
- Contract Changes

OPERATING AGREEMENTS/ BYLAWS/SHAREHOLDER AGREEMENTS



➤ Issues with Agreements

- ❖ No Agreement/Agreement that doesn't conform with company
- ❖ Two-member agreements without proper protections
 - Mechanisms to resolve conflict quickly
 - Mediation - EXCEPT IN SITUATIONS WHERE BREACH OF FIDUCIARY DUTY.
 - Buy/Sell provisions – with reasonable payout timeframe

➤ Protections

- ❖ Ensure appropriate documents are in place
- ❖ Routinely review
- ❖ Reasonable dispute guidelines
- ❖ Provisions guiding what happens in case of disability or death – including payout timeframe and insurance.
- ❖ Include Beneficial Owner expectations for cooperation for CTA compliance.

HOW TO PREVENT DISPUTES IN CONTRACT DRAFTING

HOT TOPICS IN CONTRACT DRAFTING

1

• Restrictive Covenants in Employment Agreement

2

• Indemnification Provisions

3

• Additional Insured Provisions

4

• Limitation of Liability Clauses

5

• Mediation/Arbitration Provisions

6

• Choice of Law and Venue

NON-COMPETES AND OTHER RESTRICTIVE COVENANTS

- ❑ What is a Restrictive Covenant?
 - Restrictive Covenants are clauses that prevent, prohibit, restrict, or limit the actions of a person or entity named in a contract.
- ❑ Types of Restrictive Covenants in Employment Agreements
 - Non-Compete
 - Non-solicit
 - Confidentiality
 - Non-Disclosure
- ❑ Non-compete
 - Non-completes must be limited in Scope, Duration, and Geographic location.
 - Illinois Freedom to Work Act – effective January 1, 2022
 - Should not enter into non-compete if employee earns less than \$75K
 - Non-competes must be supported by adequate consideration, be ancillary to a valid employment relationship, covenant is no greater than required for the protection of a legitimate business interest, covenant does not impose undue hardship on employee, and covenant is not injurious to the public.
 - Employees must be advised in writing

FEDERAL TRADE COMMISSION'S BAN ON NON-COMPETE AGREEMENTS

- FTC Rule banning non-competes was adopted in April 2024
 - ❖ The rules prohibit companies from requiring or enforcing most non-competes, except for those covering “senior executives” defined as those making over 151,000 per year and who are in policy-making positions.
 - ❖ In August, a judge in Texas struck the rule down. The FTC says it is seriously considering an appeal, but insists it still has the authority to bring enforcement actions against individual non-competes, case by case.
 - Companies should choose their critical stakeholders and consider alternatives
 - Make sure any restrictions are clear and transparent – naming competitors or specific industries
 - Make sure the restrictions are reasonable and designed to protect only what needs to be protected
 - Retain back-up for defense of policies that indicate why specific non-competes are in place.
- Examples of what is not considered a Non-Compete

Banning noncompetes:

Good for workers, businesses, and the economy



The FTC estimates that banning noncompetes will mean

- ▶ **More innovation:** an average of 17,000-29,000 more patents each year
- ▶ **More startups:** a 2.7% increase in new firm formation - that's 8,500+ new businesses per year
- ▶ **Higher earnings:** typical workers earn \$524 more per year

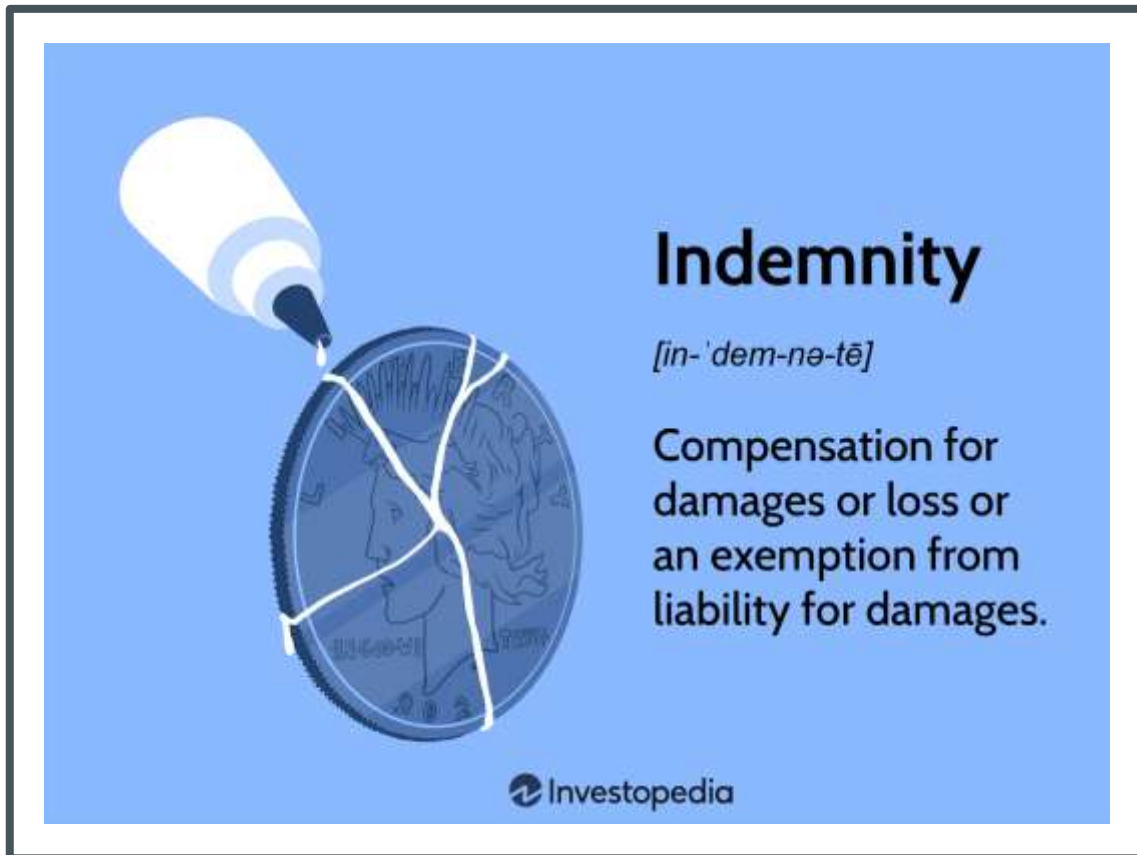
Who's affected?



An estimated
18%
of U.S. workers
are covered by
noncompetes.

That's 30 million people.

WHAT IS INDEMNIFICATION AND DO I NEED IT IN MY CONTRACT?



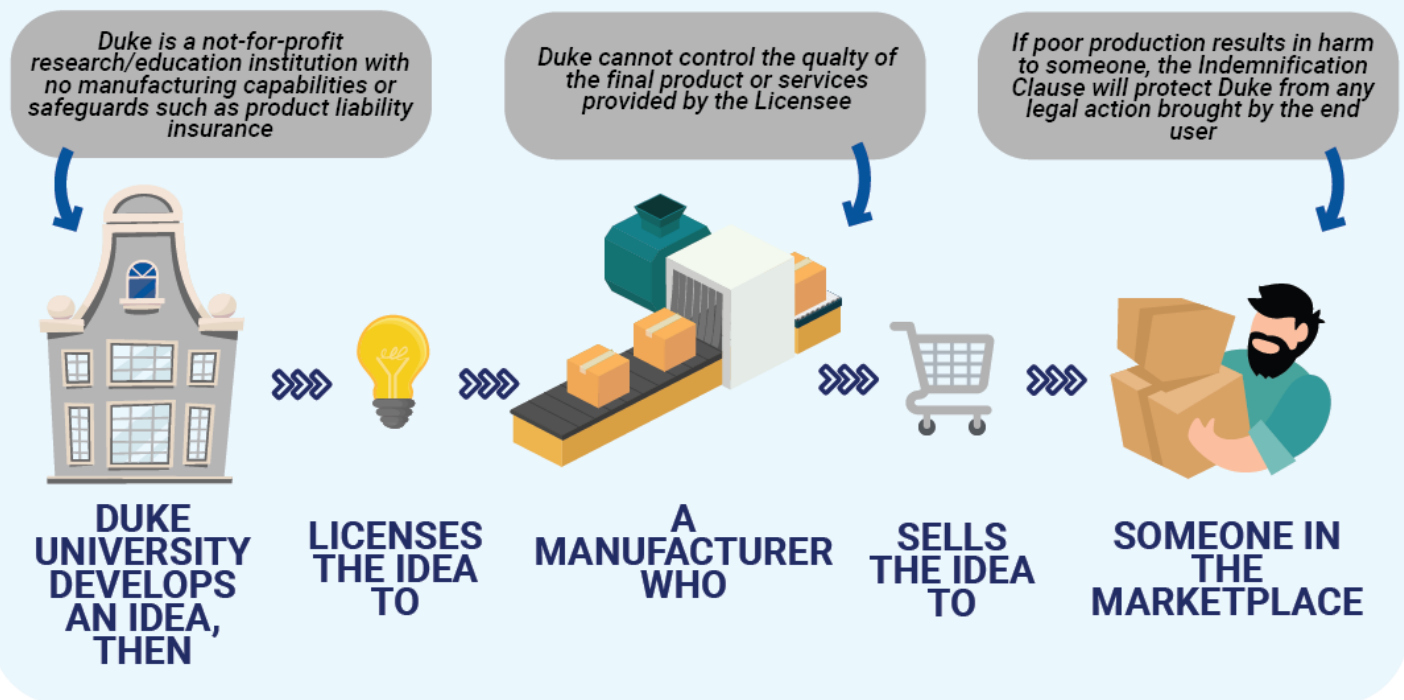
- What is an indemnification clause?
 - ❖ “the obligation of one party to compensate the other party for harm or loss incurred.”
 - ❖ Indemnification clauses appear in nearly all commercial agreements.
 - ❖ Indemnification clauses, also known as "hold harmless" clauses, are a common provision in contracts that transfer risk and potential costs from one party to another.
 - ❖ Indemnification requires the indemnifying party to reimburse the indemnified party for its paid costs/expenses/losses.
 - ❖ Obligation to defend requires
 - the indemnifying party to reimburse paid defense costs and expenses or make advance payments for unpaid defense costs and expenses
 - give the indemnifying party the right to assume the control of the defense.

SITUATION WITH AN INDEMNIFICATION CLAUSE

➤ Other examples:

- ❖ A landlord may include an indemnification clause in a lease agreement, making the tenant responsible for damages or court costs if someone is injured on the property.
- ❖ A property owner may include an indemnification clause in construction agreement, making the contractor responsible for any damages caused by construction defects.

Duke uses the Indemnification Clause to protect Duke assets from legal actions



INSURANCE PROVISIONS - ADDITIONAL INSURED



Additional Insured
[ə-'dish-nal in-'shurd]

A person or organization covered under an insurance policy registered in somebody else's name.

Investopedia

- What is an Additional Insured Provision?
 - ❖ An additional insured extends liability insurance coverage beyond the named insured to include other individuals or groups.
 - ❖ An additional insured endorsement protects the additional insured under the named insurer's policy allowing them to file a claim if sued.
- Example of an additional insured:
 - ❖ Your business hired a janitorial and floor waxing business to clean your offices. In your contract with the janitorial company, you included a provision that requires the vendor to name your business as an additional insured on their insurance policy.

LIMITATION OF LIABILITY CLAUSES

- ❑ What is a limitation of liability?
 - A limitation of liability clause in a contract limits the amount of money or damages that one party can recover from another party for breaches or performance failures.
- ❑ Example: Construction General Contractor hired to construct a large commercial building.



MEDIATION/ARBITRATION/WAIVER OF JURY PROVISIONS

- What is mediation/arbitration/waiver of jury provision?
 - ❖ Mediation
 - ❑ Typically requires the parties to participate in mediation before filing a lawsuit.
 - ❖ Arbitration
 - ❑ An arbitration clause in a contract requires the parties to resolve the disputes through arbitration rather than filing a lawsuit.
 - The benefits include:
 - Avoid lengthy lawsuits
 - Streamline dispute resolution
 - ❑ Waiver of Jury Trial
 - ❑ Results in a bench trial.



CHOICE OF LAW AND VENUE

- ❑ What is a Choice of Law Provision?
 - A contractual provision that determines which law shall apply in the event of a dispute.
 - It allows the parties to agree that a particular state's laws will be used to interpret the agreement, even if they live in a different state.
 - For example, many big corporations choose Delaware law in their contracts' choice of law provisions, because Delaware's laws often favor corporations and offer some predictability when it comes to disputes.
- ❑ Governing Law; Venue. This Agreement shall be governed by, interpreted, and construed according to the internal laws of the State of D, without reference to choice-of-law or conflict-of-law principles.



THANK YOU! ANY QUESTIONS?

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