



## Indemnities in Disguise

An indemnity is a promise to make whole, or take financial responsibility for losses incurred by another party. An indemnity might be worded so that the indemnity is limited to certain types of losses or causes of loss or a maximum amount. You can't use an indemnity to transfer legal liability (as determined by the courts), but you can agree that another party will be responsible to pay losses caused by your legal liability.

Indemnities must be reasonable; that is, they usually include things that would be covered by common law, fortuitous events that haven't happened yet, and things that are within the control of the entity granting them.

Many indemnities use typical language and phrases, such as "indemnify and hold harmless", which make them easy to recognize. A sample indemnity clause might look like this:

The School District will indemnify and save harmless the Contractor from any losses, claims, damages, actions, causes of action, costs and expenses that the Contractor may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, where the same or any of them are based upon, arise out of or occur by reason of any claim of infringement of third-party intellectual property rights related to any Materials provided to the Contractor by the Institution in connection with this Agreement .

However, sometimes the language is not so obvious, making the existence of an indemnity harder to identify. An indemnity need not explicitly include the words "indemnify and hold harmless" to be an indemnity obligation. Some agreements do not consolidate all indemnity obligations into one or two paragraphs. For these reasons (among others!) it's important to read an entire contract very carefully.

An indemnity obligation may be present if the language appears to indicate the School District may have to pay to make an entity whole after loss or damage has occurred. Indemnities may be masquerading in wording such as:

- "accept responsibility for costs"
- "reimburse"
- "defend and pay"
- "obligation to repair or repay for repairs"
- "pay for damage"
- "pay all financial obligations, loss or claims"
- "assume liability"
- "compensate for losses or damages"

A disguised indemnity might look something like this:

The School District agrees to *reimburse* "X" for the replacement cost of the items borrowed

and damaged. The School District further agrees that if it breaches any guidelines or rules and this should result either directly or indirectly in any costs and/or liabilities for “X”, that the School District shall be *liable for such costs*.

If you're not sure, feel free to contact your risk management consultant at SPP.

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