

California Indemnity Law's Impact on Crane Rental Job Tickets

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The typical job ticket serves multiple functions, including standard terms and conditions. Terms and conditions typically cover the equipment rental and duties and responsibilities of the crane operator and customer. In the event of a loss or accident, the terms and conditions identify the party required to provide indemnification and insurance coverage. Clearly, indemnification is one of the signature issues in any crane contract, and recent changes to California's indemnity law have had a significant impact on construction and crane rental service contracts.

In a typical "Type 1" indemnification agreement commonly found in a crane rental job ticket, the customer agrees to indemnify the crane operator when the customer and the crane operator's actions combine or contribute to an accident. More importantly, the customer agrees to defend and indemnify the crane service provider even if the crane operator's active negligence contributed to the accident.

California Civil Code Section 2782.05, which applies to any construction and crane rental service contract entered into after Jan. 1, 2013, voids insurance and indemnity contracts that purport to insure or indemnify for claims that arise out of, pertain to, or relate to the active negligence or willful misconduct of the crane rental company (or its operator), the general contractor, construction manager, and higher-tier subcontractors to the extent that the claim does not arise out of the subcontractor's scope of work under its subcontract.

All crane rental service job tickets, contracts, and master service agreements entered into on or after Jan. 1, 2013 should be reviewed and modified, as necessary, to assure that they comply with the changes in the indemnity statutes. Typical "Type II" or "Type III" indemnity agreements will comply with the new amendments to the indemnity statutes.

A typical "Type II" or general indemnity agreement provides the crane service provider protection for the operator's passive negligence, but excludes protection for contributory active or sole negligence, while a "Type III" agreement protects against liabilities caused by the promisor, but not for liabilities caused by others.

Another key change in the law is that contractors will no longer be able to force downstream subcontractors or suppliers to pay for the costs of defending against claims in litigation. Previously, contract provisions requiring downstream subcontractors and suppliers to pay for the costs of defense, excluding claims for sole negligence or willful misconduct, were enforceable under state law. But under the new law, owners and contractors will have a more limited ability to allocate the costs of defense to downstream contractors and suppliers, with the subcontractor not required to pay more than a "reasonable allocated share" of the general contractor's defense fees and costs.

In terms of the duty to defend, the person who has agreed to provide indemnity is bound, on the request of the person to be indemnified, to defend the action concerning the matters embraced by the indemnity immediately upon receipt of the tender of defense, but the person to be indemnified has a right to defend himself, if he wishes to do so. By default, the duty to defend is an independent obligation from the duty to indemnify. As a result, unless the parties have agreed differently, the defense is owed immediately upon receipt of the tender of his defense, irrespective of whether the right to indemnification is later established at trial. The parties can, however, agree to delay the right to a defense pending a determination of negligence during trial.

Taking these changes in California's indemnity law into account, crane rental companies and their legal representation have several options as to how they can proceed with job tickets. First, they may choose to limit each party's obligation to indemnify to their "pro rata share" of fault. In other words, each party agrees to indemnify for their own acts and no one else's, consistent with a "Type III" indemnity agreement. Another option is to cap the obligation to indemnify based on a predetermined limit or based on insurance coverage. Finally, it is important for both parties to agree on when the obligation to defend and/or indemnify will begin.

Keeping these changes in mind, crane rental providers can continue to shield themselves from potential liability utilizing the language of the job ticket rental agreement despite the alterations in the law. ■

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