

2019 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

SB 2319

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2319
2/1/2019
Job Number 31983

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to indemnity agreements in oil and gas production contracts.

Minutes:

5 Attachments

Chair Unruh: Opened the public hearing, attendance was taken, all members were present.

Senator Joan Heckaman, District 23 (0:45-2:30): Introduced the bill, please see attachment #1.

John Ward, Attorney, Association of North Dakota Insurers (3:20-6:45) Testified in support, please see attachment #2.

Chair Unruh: Why would we pick one industry as we've done in the past, and take care of this issue one industry at a time, rather than doing this as a whole?

John Ward: The reason for that is that specifically to these industries, these agreements are pretty common that's sort of where it arises. In the oil field industry, you see master service agreements. Because we have comparative negligence in North Dakota where if a party is brought into a lawsuit, each party is assessed a percentage fault of their negligence. What happens in this context is that if a big oil company will have an indemnity agreement with a smaller North Dakota oil company. Say that big oil company was found to be completely at fault, that it was fully negligent, that it caused death or injury to an employee of that small North Dakota company. The jury would render a verdict that would hold the big oil company responsible for that, but in the end, that company, which likely has workforce safety insurance for this employee, which would have paid out a death benefit, would then be responsible for paying for that oil companies judgement that was entered against them. Specifically, I think anti-indemnity agreements across the board have not been enacted, certainly I think that's something the legislature should consider, but may not necessarily be as appropriate in certain circumstances. I think the reason underlying this is the public policy which is that companies that are best suited, that have the best resources and everything else should be encouraged to have the best safety practices. If you don't have any consequence for your own actions, it doesn't incentivize purchasing that more expensive safety equipment or using that safer process.

Chair Unruh: You represent the Association of North Dakota Insurers? So most likely this is about money and payments, do we have support from the contracting sector of the economy?

John Ward: I'm not sure what you mean by contracting sector?

Chair Unruh: The actual people who enter into these agreements, the smaller companies.

John Ward: Yes, I don't know if there's anyone here to testify today, but if you can imagine the situation that a company's in, you've got Joe's Oil Field Services Company, they're getting a contract with a big oil company, they have no bargaining power in that context. It would seem unlikely to me when this bill was introduced in 2011, I believe there was support from some small companies that submitted letters. That is in the legislative history, you can't imagine Joe's Oil Field Service is going to go in there and talk to a big oil company and say I'd like to change this anti-indemnity provision, are you guys willing to do that. If they don't, they aren't going to get the work. As far as the larger companies, they operate in these states with anti-indemnity agreements, so it's certainly nothing new for them.

Chair Unruh: Does this language reflect anti-indemnity language in other states? How does this compare?

John Ward: I believe this language was adopted from the Wyoming statute. There are various iterations of this in other states. Some states also contain language that prevents choice of law provisions in contracts. For example, an oil field company can't just say, the law of the state of Nebraska, or some state that doesn't have anti-indemnity clause will apply. Or they'll have other provisions that say you can't require that your sub-contractor will list the party as additional insured on your policy, among others. I believe this is very similar to the Wyoming statute.

Senator Piepkorn: Can you give me a recent example where this might have come into the discussion?

John Ward: Without using names, I've been involved in certain cases in oil field, this is something that would be implicated in any civil lawsuit. For example, somebody was burned very badly on well site. The big oil company has been found fully liable for that by the jury. Now what has happened after that judgement is entered, there are lawsuits between the companies and insurers, so you have multiple layers of litigation. You have litigation between the sub-contractor and the company, and there can be litigation beyond that. For example, what you'll see is the underlying lawsuit has been resolved, and now there's this fight over who's going to pay that judgment, and oftentimes if the sub-contractor or their insurance company says we're not going to pay this judgement because there's an anti-indemnity provision that's in effect and the company who was found negligent, their employee was the one who caused the injury as decided by a jury. That company is now trying to avoid its liability saying you guys have to pay for this. Then you'll end up seeing the big oil companies sue the sub-contractor for breach of contract, because according to the contract that they have to their master service agreement, their international drilling contract, they have agreed to indemnify that company for their own negligence. Really there's not much incentive to try to use the best practices to avoid injuries.

Jaclyn Hall, Executive Director, North Dakota Association of Justice (14:45-23:25) Testified in favor, please see attachments #3-4. For additional reference, please see the minutes for HB1166 from 2011.

Chair Unruh: Who are you here on behalf of?

Jaclyn Hall: The North Dakota Association for Justice. It's an association that supports plaintiff attorneys across the state.

Senator Piepkorn: Do any oil companies operate without the MSA?

Jaclyn Hall: I do not believe so, I have not entered into an MSA, so I don't know for sure.

Todd Kranda, Attorney, North Dakota Petroleum Council (24:30-27:30) Testified in opposition, please see attachment #5 The choice to enter into these contracts exists. In 2011, I looked to see who testified, Attorney Sanderson testified Association of North Dakota Insurers, Robert Saunders manager for EMC Insurers, Craig Oksol Manager Insurance Inc. testified, there were no contracting parties other than insurers that provided testimony. Safety is the number one priority for our NDPC members, in those MSA contracts there are safety requirements and standards that even apply to our service companies that they have to adhere to. There are some entities that operate without an MSA agreement. The situation we have is it's a choice that can be entered into, we believe 2319 is not necessary and is an inappropriate interference with a private party's right to enter into contracts that contain indemnity provisions. Indemnity agreements are not inconsistent with what we do, it's a risk allocation between contracting parties.

Chair Unruh: The NDPC represents the oil and gas industry but I see that you've got over 500 companies I would imagine some of these smaller contracting companies are also members?

Todd Kranda: Yes, we have a range of membership from small to large, across the board, throughout the state.

Vice-Chair Kreun: You mentioned the contracts they have with smaller companies they have safety regulations through that, how significant are they and do they have a safety officer that monitors those regulations they put on that contractor?

Todd Kranda: The extent of the safety manager, I only know of a couple companies I represent independent of the Association, in terms of those companies, yes, they have a safety manager, and yes they try to as best they can to make sure they comply with those safety regulations and they're part of the contract, nobody wants to have an injury.

Senator Piepkorn: There was a suggestion made that if a contractor did not agree to the MSA, they're out of it and there are plenty of companies that would take that work without questioning the MSA. What's your reaction to that?

Todd Kranda: I don't know whether companies accept or deny just because of one provision. There's a lot that goes into that. It is a choice between the contractors whether those two parties want to enter into a contract and if they don't want to, they don't have to. Absolutely they'll look for someone else taking on that risk or the project.

Senator Piepkorn: In major league sports, the term collusion comes up all the time. Is there the possibility of collusion among oil companies to adhere to this MSA policy and only hire people who agree to it?

Todd Kranda: No.

Matt Gardner, Greater North Dakota Chamber, National Association of Manufactures (32:50) Testified in opposition. I think it's important for business to allow the two parties to negotiate on their own. Try not to be too prescriptive in policy. They're currently allowed in other business sectors, these type of agreements, why is oil singled out? We are concerned that if it starts here how is it going to impact other industries?

Roger Kelly, Continental Resources (33:50) Testified in opposition. What I hear from the testimony is there's no experience. I worked for 25 years as a sub-contractor to oil companies all over the country. I work in every oil producing state. I've signed the MSAs, if I didn't sign the MSA, I didn't work for them, that was protection for them. I had to carry a certain amount of insurance, which is required to work on their locations, so they're protected and I understood that. I have seen several situations where sub-contractors have been ignored. I've written safety manuals for companies, I've done environmental work and operations work and safety work; and most companies are anal retentive about safety. If you do something on their property that's against safety regulations, you get run off. I work for small-medium companies, Continental is a larger independent, but I've seen a lot of situations companies would come in to the location of some of my clients and work with equipment that was not intrinsically safe, which means it wasn't spark proof, they cause explosions, they cause people to get burned. Contractors will do that sometimes; oil companies will do that sometimes. Everybody makes mistakes, all rules and regulations that we use are to prevent such actions from happening. They're protection for the contractor, they're protection for the oil company. I don't know the law in Texas the reality of the operations is just the way it is out there. It happens both directions

No agency testimony.

Chair Unruh: Closed the public hearing.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2319
2/7/2019
Job Number 32359

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

Relating to indemnity agreements in oil and gas production contracts.

Minutes:

1 Attachment

Senator Roers: Vice Chair Kreun and I have done a lot of work on this, I think that there is some information we'd like to share. If we could ask Mr. Kranda to come up and talk about some terminology that's in these agreements, it would shed some light on some of the stories told here.

Todd Kranda, North Dakota Petroleum Council: I appreciate the opportunity to offer some additional information and clarification that came up during discussion. We've put together an additional packet to be a reference guide, **please see attachment #1**. We took the information presented and did a little research internally and decided we'd like to supplement the record. This is what you may recall the anti-indemnity legislation, there was some conversation about targeting the oil and gas industry and focusing on my industry. There are only four states, I have provided in the first part of the packet a blog reference that goes through the four states, Louisiana, Texas, Wyoming, and New Mexico, pretty user friendly. We summarized below that, a few of the things; there are differences. If you recall the testimony focused on Texas. Texas doesn't prohibit, in fact it allows, provided there is insurance available, acquired, and it's not prohibited if it is also conspicuous, bold print, all caps. We wanted to point out that that was relied upon, to make North Dakota more like Texas, you're not, this bill would go well beyond that. It doesn't prohibit indemnity agreements. The other item, we took at survey, The Petroleum Council contacted some of its members that do the MSA, the interesting aspect is that it is not quite as it was described. We dispute that now that we've done some research. We have our companies providing 'knock for knock.' It's a mutual reciprocal type of indemnity. Each individual is allowed to be responsible for the injuries of their own employees regardless of who is at fault. It's kind of like a no-fault insurance policy for your vehicle. You have an accident you look to your own insurance company for your damages for that injury. That what the second portion provides for you, the 'knock for knock' reciprocal indemnity, this bill would prohibit that. It would open that up and make some uncertainty. The other point was suggesting that we aren't involved with safety, didn't concern ourselves with either our service providers, their employees or our employees. That is absolutely incorrect. The handout covers our safety program our safety

requirements, the Petroleum Council has recently announced One Basin, One Way it's a standardized contractor safety orientation program that is opened up to our members and to the industry to facilitate further safety training, unify the way it's done. It brings it together under one program that's being developed. Our members have indicated they're going to get a lot of use out of that. We want to set the standard. There's a Williston article that deals with that. I thought that would help facilitate your understanding.

Vice-Chair Kreun: To make a comment, during the testimony I did ask the oil industry what their safety measures were. They gave us a highlight of it, but I believe some of the safety measures put in place by the petroleum industry; whether it be the contractor or the basin people or the owners of these oil companies are very tight, very strict. I think in our industry has been relatively safe over a period of time. I think we're in pretty good shape; with this new safety program coming online, every single person in the oil industry will be trained under the same standards. That's another indication, if this was such a huge issue, we should have contractors lined up here indicating they can't do the work. I don't see that, I didn't see anybody testifying in that respect, other than two insurance companies and a trial lawyer. I become a little suspect of some of the information that we got might not be complete.
I move a Do Not Pass.

Senator Roers: I second

Senator Piepkorn: Unlike Vice Chair Kreun, I do not suspect some of the testimony we received in favor, because they were from certain industries and from an attorney. There are plenty of attorneys representing both sides of the issues we face here. I believe the contractors have reasons for not showing up or could make it. I'm a little leery of the process in our committees, we have the bill, we accept testimony in favor and testimony against. In this case the against the bill has an opportunity to refute testimony for the bill after being able to research. I'm not calling for the yeas in support to come back; not that this additional testimony will change any minds, there seems to be some discrepancy in that process.

Chair Unruh: That's why I asked if we wanted additional information; I had assumed you would indicate that.

Vice-Chair Kreun: This was additional testimony; this isn't to rebut anybody's testimony. What I indicated was my observation of how it was presented to us. This additional information is in these MSAs. That wasn't mentioned to us. That's an extremely important part of this MSA, without that it changes the whole complexity of this issue. This knock for knock issue is indemnifying each other back and forth, and makes it so that they're responsible for each of their own actions. That is in the MSA, which wasn't provided to us in the beginning. It did change my mind to make sure I'm doing the right thing.

Senator Roers: It was a game changer, learning what knock for knock really means. What we were told in testimony is that the big guys were beating up on the little guys. The real question is, where were the little guys? They never showed up. The reason they didn't show up is because what was being purported here doesn't happen in real life. It was game changer for us to learn about the industry and how it functions. I also was one that changed my mind.

A roll call vote was taken.

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Motion passes 5-1-0

Senator Roers will carry.

Chair Unruh: Closed committee action.

Date: 2/7
 Roll Call Vote #: 1

**2019 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2319**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: _____

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Sen. Kreun Seconded By Sen. Roers

| Senators | Yes | No | Senators | Yes | No |
|-------------------------|-----|----|--------------------------|-----|----|
| Senator Jessica Unruh | X | | Senator Merrill Piepkorn | | X |
| Senator Curt Kreun | X | | | | |
| Senator Donald Schaible | X | | | | |
| Senator Dwight Cook | X | | | | |
| Senator Jim Roers | X | | | | |
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Total (Yes) 5 No 1

Absent 0

Floor Assignment Sen. Roers

If the vote is on an amendment, briefly indicate intent:

2019 TESTIMONY

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SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

SENATOR JOAN HECKAMAN

Chairman and Members of the Committee:

I am Senator Joan Heckaman, D-23, and I am here to introduce SB 2319 to you this morning with the understanding that as soon as I am done, I have to leave and head to the Judicial Wing for a 9:15 hearing.

SB 2319 relates to indemnity agreements when one person or entity agrees to protect another from a legal consequence that would result from the conduct of the protected person. For example, car insurance companies provide indemnity to a protected driver.

This bill would prevent oil companies from requiring subcontractors to indemnify the oil company for the company's own negligence. This puts North Dakota in line with our broader public policy of holding individuals responsible for their own actions and their own negligence.

Currently, oil companies require subcontractors to sign service agreements that include indemnification clauses, protecting the oil company from consequences of any negligence on their own behalf. By prohibiting these types of agreements, the legislature would be advancing worker safety in the oil field. We would be saying that indemnity clauses are against public policy in North Dakota. By holding companies accountable for the safety of workers on their own sites and for their negligence that results in harm to other persons or property, this bill promotes a fairer and safer environment.

There will be further testimony to clarify any questions you may have.

There has been a request from the supporters of this bill to add the word "completing" after the word drilling on page 1, line 21.

Mr. Chairman, that completes my testimony and I would leave any questions you may have to those who testify next.

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TESTIMONY IN SUPPORT OF SENATE BILL 2319
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
FEBRUARY 1, 2019

Chairman Unruh and Members of the Senate Energy and Natural Resources Committee, my name is John Ward. I am an attorney in the Bismarck law firm of Zuger Kirmis & Smith. I represent the Association of North Dakota Insurers (ANDI) in support of Senate Bill 2319. The Association of North Dakota Insurers is a group composed of North Dakota domestic insurance companies

SB 2319 is needed to address an inequity that has arisen in the oil industry in North Dakota. As part of the oil production efforts, oil companies typically enter into master service agreements with contractors who supply various services and materials used in the oilfield operations. These agreements usually require the contractors to indemnify the oil company against any claims arising out of the services or materials provided by the contractor, even if caused by the oil company's own negligence. The indemnity provisions usually have some form of the following language: "Contractor agrees to protect, defend, indemnify and hold harmless company and its employees from all damages, loss, claims, costs, and liability of any kind including the negligence of the company". The contractors are often required to carry certain levels of insurance coverage for the benefit of the oil company. In effect, the oil companies are shifting the liability and costs for their own actions to the smaller contractors and their insurance companies.

SB 2319 would declare that any agreement in an oil and gas service contract which requires one party to indemnify another party for that party's own negligence is void. This bill will ensure that both parties, the oil company and the contractor, will only be responsible for their own fault or negligence. The oil company will not be responsible to pay for any negligence on the part of the contractor. Likewise, the contractor will not be responsible to pay for the negligence of the oil company. SB 2319 will ensure that all parties will be responsible for their own negligence. Any contractual provisions to the contrary will be void against public policy.

Subsection 1 of the bill makes any indemnity agreement that seeks to indemnify a party for its own negligence or the negligence of its employees void. Subsection 2 of the bill limits the anti-indemnity provision to oilfield activities. Subsection 3 ensures that this bill does not interfere with the laws of workforce safety. Subsection 4 of the bill does not preclude a land owner from securing any indemnity agreements related to operations on the owner's land.

SB 2319 is similar to the Oilfield Anti-Indemnity statutes enacted in four of the largest oil producing states in the country: Texas, Wyoming, Louisiana, and New Mexico. These states recognized the ultra-hazardous nature of the work performed in the oil industry. These statutes were enacted to prevent oil companies from shifting liability for its own negligence to smaller contractors. No longer are oil companies in these states permitted to require the smaller

contractors to indemnify them when people are injured because of the oil company's own negligence.

Anti-indemnity statutes are not a new concept in North Dakota. Anti-indemnity statutes similar to SB 2319 have been enacted in North Dakota to govern other contracts and industries. In 2009, the Legislative Assembly enacted N.D.C.C. § 22-02-10 which declares that any indemnification provision in a motor carrier transportation contract is void. In addition, the Legislative Assembly has declared in N.D.C.C. § 26.1-04-03(16) that any contract requiring a health care provider to indemnify any entity for the entity's own negligence is void. Indemnification provisions were also restricted in state service contracts in N.D.C.C. § 32-12.2-17. These statutes all ensure that North Dakota's comparative fault system is followed.

For the foregoing reasons, the Association of North Dakota Insurers supports SB 2319 and urges a Do Pass on this bill.

TESTIMONY IN SUPPORT OF SENATE BILL 2319

My name is Jaclyn Hall. I am the executive director for the North Dakota Association of Justice. I am here to testify in support of Senate Bill 2319. This testimony is given on behalf of our members at Johnson and Sundeen.

This bill is about fairness. Fairness for North Dakota businesses, fairness for workers in the oil field, and fairness for insurance companies. It is also about preventing the abuse of our Workforce Safety & Insurance to protect companies that have no culture of safety. In 2011, a similar bill HB 1166 was proposed. It came out of committee with a “do pass” recommendation but was voted down after great lobbying efforts of mostly out-of-state oil companies. The insurance industry was largely responsible for introducing and supporting the 2011 bill. I have attached a copy of the testimony in support of that bill. Why would we try again, when a similar bill was rejected in the past? Because the past 8 years have shown us that our state’s oil boom is not a flash in the pan and because the other states with similar laws have proved that they work to increase fairness and safety without shutting down the oil industry.

The public policy behind this bill is that a company whose actual wrong acts cause an injury should not be allowed to force other companies, such as North Dakota's many oilfield service contractors, to bear responsibility for it. This public policy has been recognized in other oil and gas producing states and it has improved safety without harming the industry.

When any oilfield service contractor wants to do work with an oil company in North Dakota, the contractor must sign a Master Service Agreement (MSA) before it can be on the company's approved vendor list. The MSA is a contract of adhesion: If a contractor does not sign it in the exact form offered by the operator, that contractor will not get any work.

The MSA has many terms, but a universal one requires the contractor and its insurance company to indemnify the oil company from all injuries and deaths on the well site, even if the oil company itself caused the injury or death.

The MSA is not something that contractors voluntarily agree to. It is a mandatory part of doing work in the oilfield. The insurers for North Dakota's oilfield service companies are forced to pay claims for injuries

caused by large oil companies. The insurance industry is based on covering claims that the actual company paying for coverage caused, not based on the shifting responsibility that oil company MSA's force on their insureds.

That equates to an increased cost of insurance premiums for North Dakota companies and other small businesses that work in the North Dakota oilfield. It is a cost that should be paid by the large oil companies, but which they avoid. It shifts the costs from the largest companies to the small businesses that North Dakotans build and run to service the oilfield.

There are four oil and gas producing states with provisions like those proposed by SB 2319: Texas, Louisiana, New Mexico, and Wyoming.

This bill is based primarily upon the law from Wyoming but is substantially similar to Texas law. Attached to my testimony is a Memorandum of Anti-Indemnity Statutes that was prepared by Johnson & Sundeen Law Office in Watford City, the epicenter of oil production in North Dakota. The Memorandum shows that anti-indemnity laws are common throughout the United States. Those states have recognized that public policy and basic fairness are protected by

these laws and that, without these laws, the largest oil companies will have unequal bargaining power to force unfair indemnity agreements on all of their service contractors. A company with no responsibility for the safety of workers, landowners, or the public has little incentive to work safely. Safety of workers and the public becomes much more important to companies when they cannot force a contract on others that makes them responsible for the company's own bad acts.

Another problem with indemnity agreements is that they frustrate the operation of our Workforce Safety and Insurance system. If you are hurt at work, you cannot sue your employer. WSI covers your medical bills and lost income. For many workers injured in the oilfield, the medical bills are astronomical because the injuries include severe burns and lost limbs. Their lost income is also great, because they were making good money working on the wells. WSI has to pay these claims.

But if the injury was caused by a third party, other than your employer, you can go to court against that third party. If you prove that the third party caused your injury, then that third party will be responsible for your medical bills and lost income. But you have to pay WSI back. WSI recovers, up to the full amount it has paid out to an injured worker and

the future amount it expects to pay to the injured worker for his lifetime, half of the worker's insurance settlement or jury verdict. Indemnity agreements interfere with that, because they force the employer to indemnify the company that is actually at fault. You cannot sue your employer if you are hurt at work, but when you sue the company that actually hurt you it is your employer and its insurance company who pay for the lawyers. And those lawyers have the main goal of blaming the employer—the employer who pays their bills—for the injury, to ensure that nobody other than WSI has to pay for the injured worker's medical bills and lost income.

Worker injuries are not the only type that occur in the oilfield. When a spill occurs, even if the company whose well spilled oil or brine on the land was negligent, an indemnity provision can force a small North Dakota service contractor to cover all of the economic damages caused by the spill.

SB 2319 will not make any company liable for damages that it did not cause. It will not allow anyone to sue a company that they cannot sue today. It will protect North Dakota companies, workers, insurance companies, landowners, and WSI from unfair indemnity agreements.

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And it will give oil companies a strong incentive to create a culture of safety, in which safety rules are not only paid lip service but actually lived up to by every company and worker on every well.

The oil industry may oppose this bill. That happened to HB 1166 in the 2011 session. Why would an oil company oppose a bill that promotes safety for workers and the public? Why would an oil company oppose a bill whose only effect is to prevent the oil company from forcing its small service contractors to bear responsibility for the oil company's own misdeeds? Why would an oil company oppose a bill that puts the oil company on the same footing as the North Dakota service contractors who do the real work to drill and complete its wells? Every person and company should be responsible for their own actions, whether those actions are good or bad. Oil companies should be no different.

Oil companies still are drilling for oil and producing oil in New Mexico, Wyoming, Louisiana, and Texas. Similar laws in those states have done nothing to stop the exploration for or production of oil and gas. One only needs to look at the boom going on in the Texas oil industry at this time, which flourishes under a law that is substantially similar to SB 2319. Texas is the only state that produces more oil than North Dakota.

To bring fairness to North Dakota's oilfield and the workers and small businesses that make our state's oil industry work and whose efforts have made North Dakota the second leading oil producing state and a key to the energy independence of our nation, I ask for a "do pass" recommendation for SB 2319.

Thank you.

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MASTER SERVICE AGREEMENT LANGUAGE

The language below is typical Indemnification Language found in a Master Service Agreement required by most oil companies to be signed by any company doing work for the oil company. In this example the "Subcontractor" is the company who is signing the agreement to do work for the oil company. "Contractor" is the oil company.

Subcontractor agrees to protect, defend, indemnify and hold harmless Contractor, its officers, directors, employees or their invitees, and any customer for whom Contractor is performing services, from and against all claims, demands, and causes of action of every kind and character without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Contractor, any theory of strict liability and defect of premises, or the unseaworthiness of any vessel [if offshore operations are conducted] (whether or not preexisting the date of this Contract), arising in connection herewith in favor of Subcontractor's employees, Subcontractor's subcontractors or their employees, or Subcontractor's invitees on account of bodily injury, death or damage to property.

The language below is typically also in a Master Service Agreement. It says the Contractor (oil company) will indemnify the subcontractor (company doing work for the oil company) for any claims made by the oil company's employees. The irony is that oil companies almost never have employees on the site when drilling or completing a well and often use independent pumpers to operate their wells. Oil companies through the Master Service Agreement requires anyone doing work on the well site to agree they are independent contractors, including the "Company Man" who is consultant selected by the oil company. Thus, the language below has never a benefit to the company hired by the oil company to do work and is a meaningless promise.

Contractor agrees to protect, defend, indemnify and hold harmless Subcontractor, its officers, directors and employees or their invitees, from and against all claims, demands, and causes of action of every kind and character without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Subcontractor, any theory of strict liability and defect of premises, or the unseaworthiness of any vessel [if offshore operations are conducted] (whether or not preexisting the date of this Contract), arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors (other than Subcontractor herein) or their employees, or Contractor's invitees on account of bodily injury, death or damage to property.

Memorandum of Anti-Indemnity Statutes

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A 50 State Survey of Statutes, Bills, and opportunities for improvement.

Johnson & Sundeen, Watford City, North Dakota 2018 ©

This document provides an overview of current Oilfield Anti-Indemnity statutes. Texas, Louisiana, New Mexico and Wyoming have enacted anti-indemnity statutes specific to oil field contracts; however, many states have construction anti-indemnity statutes with similar goals and effects, some of which may be applicable to oil field contracts. For this reason, a comprehensive overview is provided to 1) show where oilfield anti-indemnity statutes exist, 2) indicate which states have considered similar legislation, and 3) how such provisions are similar to, interpreted consistently with, and perhaps could be drawn from, similar statutes for construction agreements. It is important to note, while some states may not have an explicit statute for oilfield contracts, they may interpret such contracts in accordance with the requirements of construction anti-indemnity provisions or other similar statutes, thus, in effect, restricting not-so-bargained-for indemnity, despite no explicit statute addressing master service agreements. Please also note, there are color-coordinated statute indications, so if you are viewing in black and white, you may not be seeing the full effect.

There are three recognized levels of indemnity these statutes are classified under. These levels include: limited, intermediate (full or partial), and broad. **Limited** indemnity occurs when a subcontractor only assumes responsibility for his own negligence when solely at fault (allowed in all states). **Intermediate** occurs where a subcontractor assumes responsibility for its sole or partial negligence; **full** where subcontractor is partially at fault but pays all the damages, and **partial** where indemnity is scaled based on each party's attributable fault. Finally, **broad** indemnity is where a subcontractor assumes full responsibility and fully indemnifies the contractor regardless of who is actually at fault.

Matthiesen, Wickert, & Lehrer published and continually update a comprehensive 50 State Survey of anti-indemnity provisions in construction contracts, updated as recently as August 2018. Language from these statutes may be helpful to incorporate into new legislation or expanded applicability to cover similar provisions in oilfield service contracts. The need for this statutory safeguard in contractor-subcontractor agreements carries into oilfield master service agreements between major producer and service company, that is, the superior bargaining power of the owner/general contractor/producer and the inherent unfairness of shifting all fault to the party with less bargaining power and protection. The first column cites bills, oilfield statutes, and general indemnity statutes and indicates which by color. The next column incorporates the language from either the oilfield statute, or the construction contract statute, while the final column discusses other indemnity statutes associated with the previous language, where there is no oilfield statute.

Oil Statute | Bill |
General
Indemnity Statute

Language

Comments

| Alabama | No statute. | | |
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| Alaska | Alaska Stat. § 45.45.900 | “this provision does not affect . . . a provision, clause, covenant, or agreement of indemnification respecting the handling, containment, or cleanup of oil or hazardous substances as defined in AS 46.” Alaska Stat. Ann. § 45.45.900 | Construction contracts; death/bodily injury to persons, injury to property, design defects, other loss/damage/expense from sole negligence or willful misconduct...is void. no application to handling, containment, or cleanup of oil or hazardous substances. |
| Arizona | A.R.S. §§ 32-1159, 34-226, 41-2586 | A covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract. . . to hold harmless or to defend the promisee from or against liability for loss or damage resulting from the sole negligence of the promisee or the promisee’s agents. . . is against the public policy of this state and is void . | Subcontractor may indemnify non-party who enters into agreement to allow subcontractor access to property adjacent to work. |
| Arkansas | Ark. Code §§ 4-56-104; 22-9-214 | Provision in construction contract is void if it requires <i>entity</i> or <i>entity’s insurer</i> to indemnify, defend, or hold harmless another. . . for damage arising out of the death or bodily injury to a person, damage to property, which arises out of the negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers. <i>Does not affect</i> construction contract to: provide construction work or services to an operator or other person directly related to activities or operations stemming from the exploration, drilling, production, processing, gathering, or movement of oil or gas | Includes bar on insurance Specifically not applicable to oilfield contracts |

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| California | Civ. Code § 2782; 2782.5 | Provisions. . . that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable. | Does not prevent negotiated-for allocation/limit |
| Colorado | Colo. Rev. Stat. §§ 13—50.5-102 | Any public contract or agreement for architectural, engineering, or surveying services; design; construction; alteration; repair; or maintenance of any building, structure, highway, bridge, viaduct, water, sewer, or gas distribution system, or other works dealing with construction. . . . that contains a covenant, promise, agreement. . . . Any such covenant, promise, agreement, or combination thereof requiring an indemnity obligor to defend, indemnify, or hold harmless any public entity from that public entity's own negligence is void as against public policy and wholly unenforceable. | N/A to construction bonds or insurance contracts. N/A to breach of trust or other fiduciary obligation. Only applies to claims against building professionals based on injuries caused by defects in building construction improvements. Enforceable only to the extent of attributable harm |
| Connecticut | Conn. Gen. Stat. § 52-572k | Any covenant, promise, agreement or understanding. . . relative to the construction, alteration, repair or maintenance of any building. . . that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer. | Agreement requiring purchase of insurance, <i>may be</i> void, but not automatically. |
| Delaware | Del. Code, Title 6 § 2704 | "a contract or agreement...purporting to indemnify or hold harmless the promisee or indemnitee or others...for damages...caused partially or solely by, or resulting partially or solely from, or arising | Agreement requiring purchase of insurance, <i>may be</i> void, but not automatically. |

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partially or solely out of the negligence of such promisee or indemnitee or others than the promisor or indemnitor...is against public policy and is void and unenforceable..."

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| Florida | Fla. Stat. § 725.06 | ... contract to indemnify or hold harmless the other party. . . . for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract | Only applies where indemnitee seeks indemnification for his own negligence. <i>Great Divide Ins. Co. v. Amerisure Ins. Co.</i> , 2018 WL 1318340 (S.D. Fla. Mar. 14, 2018) |
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| Georgia | Ga. Code § 13-8-2 | Contracts against public policy... ". . . . agreement in connection with. . . .construction, alteration, repair, or maintenance. . . .purporting to require that one party. . . .indemnify, hold harmless, insure, or defend the other. . . . arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee. . . is against public policy and void and unenforceable." | May contract from liability for negligence without being deemed void. <i>P</i> |
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| Hawaii | Hawaii Rev. Stat. § 431:10-222 | "Any. . . . agreement. . . .relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance. . . .purporting to indemnify the promisee against liability for bodily injury to persons or damage to property caused by or resulting from the sole negligence or wilful misconduct of the promise. . . ., is invalid as against public policy, and is void and unenforceable. . . ." | Provisions invalid: indemnity for sole negligence or willful misconduct of indemnitee. No impact on insurance agreements |
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| Idaho | Idaho Rev. Stat. § 29-114 | A[n]. . . . agreement. . . .in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance. . . .purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, | Cannot contract out of actions resulting from indemnitee <i>sole negligence</i> No impact on contracts in existence before the act |
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is against public policy and is void and unenforceable.

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| Illinois | Indemnification for Negligence Act, 740 ILCS § 35/1 | “With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance. . . . every covenant, promise or agreement to indemnify or hold harmless another person from that person’s own negligence is void as against public policy and wholly unenforceable.” | Agreement to obtain insurance for a third party is not void under the statute. <i>Jokich v. Union Oil Co.</i> , 214 Ill. App.3d 906 (App. Ill. 1991). |
| Indiana | Ind. Code § 26-2-5 | All provisions. . . . or agreements or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for: (1) Death or bodily injury to persons; (2) Injury to property; (3) Design defects; or (4) Any other loss, damage or expense arising under either (1), (2) or (3); from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable. | Cannot contract away damages resulting from sole negligence or willful misconduct. |
| Iowa | Iowa Code § 537 A.5 | a provision in a construction contract that requires one party to the construction contract to indemnify, hold harmless, or defend any other party to the construction contract. . . . to the extent caused by or resulting from the negligent act or omission of the indemnitee. . . . is void and unenforceable as contrary to public policy. | In-state construction contracts governed by Iowa law, cannot be negotiated away by choice of law. |
| Kansas | Kansas Stat. § 16-121 | An indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee’s negligence or intentional acts or | |

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omissions is against public policy and is void and unenforceable.

“Construction contract” shall not include any design, construction, alteration, renovation, repair or maintenance of:

(A) Dirt or gravel roads used to access oil and gas wells and associated facilities; or

(B) oil flow lines or gas gathering lines used in association with the transportation of production from oil and gas wells from the wellhead to oil storage facilities or gas transmission lines.

Provision requiring a party to provide liability as additional insured is also void and unenforceable.

Specifically n/a to oil flow and gas gathering lines.

Kentucky

Kentucky Rev. Stat § 371.180

Any provision contained in any construction services contract purporting to indemnify or hold harmless a contractor from that contractor’s own negligence or from the negligence of his or her agents, or employees is void and wholly unenforceable.

Louisiana

Louisiana Oilfield Indemnity Act (LOIA)
LSA § 9:2780(A)(G)

Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

N/A to public utilities, forestry, or Sulphur

Maine

No statute

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Maryland
**Md. Code Ann.,
Cts. & Jud. Proc.
5-401**

A[n]. . . agreement. . . relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance. . . .purporting to indemnify the promisee against liability for damages arising out of **bodily injury to any person or damage to property** caused by or resulting from the **sole negligence** of the promisee or indemnitee. . . . is against public policy and is void and unenforceable.

Does not affect validity of insurance contract.
Sole negligence

Massachusetts
**Mass. Gen. Laws,
Ch. 149 §29E**

Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work. . . .which requires a subcontractor to indemnify any party for injury to persons or damage to property **not caused by the subcontractor** or its employees, agents or subcontractors, shall be void.

Only applies to public works

Michigan
**Mich. Comp.
Laws § 691.991**

In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property. . . . a provision purporting to indemnify the promisee against liability for damages arising out of **bodily injury to persons or damage to property** caused by or resulting from the **sole negligence** of the promisee or indemnitee. . . . is against public policy and is void and unenforceable.

One's sole negligence – cannot be attributed to other through contract

Minnesota
**Minn. Stat. §§
337.02**

An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the **negligent** or otherwise **wrongful act or omission**, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates; or (2) an owner, a responsible party, or a

Includes breach of contractual duties

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governmental entity agrees to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.

Mississippi

Miss. Code § 31-5-41

With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person **from that person's own negligence** is void as against public policy and wholly unenforceable.

N/A to insurance agreements

Missouri

Mo. Rev. Stat. § 434.100

Except as provided in subsection 2 of this section, in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable.

Own (sole) negligence)

Montana

Mont. Rev. Code § 28-2-2111

Except as provided in subsections (2) and (3), a construction contract provision that requires one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party or the other party's officers, employees, or agents is void as against the public policy of this state.

may contain provisions

(2) A construction contract may contain a provision:

(a) requiring one party to the contract to indemnify, hold harmless, or insure the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness,

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or intentional misconduct of a third party or of the indemnifying party or the indemnifying party's officers, employees, or agents; or

(b) requiring a party to the contract to purchase a project-specific insurance policy, including but not limited to an owner's and contractor's protective insurance, a project management protective liability insurance, or a builder's risk insurance.

Nebraska

Neb. Rev. Stat. §
25-21; 187

In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. This subsection shall not apply to construction bonds or insurance contracts or agreements.

Nevada

Nev. Rev. Stat.
Ann. § 40.693

. . . any provision in a contract entered into on or after February 24, 2015, for residential construction that requires a subcontractor to indemnify, defend or otherwise hold harmless a controlling party from any liability, claim, action or cause of action resulting from a constructional defect **caused by the negligence**, whether active or passive, or **intentional act or omission** of the controlling party is against public policy and is void and unenforceable.

. . . to the extent that it requires a subcontractor to defend. . . from a constructional defect arising out of, related to or connected with that portion of the

Notes: AB (Assembly Bill) 125 signed into law in 2015 was a major overhaul of previous construction defect laws.

Only prohibits indemnity and defense that requires sub-k to indemnify for general k's own negligence or intentional acts. Therefore, N/A to agreements requiring sub-k to indemnify for issues arising out of his own scope of work.

Not void if provision requires subcontractor indemnity for defects arising out of his own

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subcontractor's work which has been altered or modified by another trade or the controlling party.

scope of work, negligence, intentional act, or omissions

Any agreement. . . .an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons shall be against public policy, void and wholly unenforceable.

New Hampshire

N.H. Rev. Stat. § 338-A:1 & A:2

Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition, or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water, or other utility line, which requires any party to indemnify any person or entity for injury to persons or damage to property not caused by the party or its employees, agents, or subcontractors, shall be void.

New Jersey

N.J. Stat. § 2A:40A-1

A[n]. . . . agreement or understanding in, or in connection with or collateral to a contract. . . . construction, alteration, repair, maintenance, servicing, or security of a building, structure, highway, railroad, appurtenance and appliance. . . . purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the **sole negligence** of the promisee. . . . is void and unenforceable;

No effect on insurance contracts

New Mexico

NM ST § 56-7-1
NM ST § 56-7-2

A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract. . . . against liability, claims, damages, losses or expenses, including attorney fees,

Choice of law provisions avoiding effects of this statute are voidable.
Voids indemnity agreements for sole or concurrent negligence of indemnitee or independent contractor directly responsible to indemnitee.

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arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

Agreements accounting for liability for own actions of contractor valid. *XTO Energy v. ATD* 189 F. Supp. 3d 1174 (D.N.M. 2016).

All agreements “pertaining to a well for oil, gas or water, or a mine for a mineral, within New Mexico...”

123.45

New York

N.Y. Gen. Oblig. Laws § 5-322.1

A[n] agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances. . . .purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee. . . whether such negligence be in whole or in part, is against public policy and is void and unenforceable;

N/A to validity of insurance contract.

North Carolina

N.C. Gen. Stat. § 22B-1

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance. . . .purporting to indemnify or hold harmless the promisee. . . .against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.

Whole or part negligence

Indemnity for own sole negligence not excluded

N/A insurance contracts

North Dakota

No statute

Ohio

Ohio Rev. Stat. §
2305.31

A[n]. . . agreement. . . relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnities against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnities is against public policy and is void.

Agreement by subcontractor to name general as additional insured is included in indemnity agreement prohibited by statute. *Buckeye Union Ins. v. Zavarella Bros Constr. Co.*, 699 N.E.2d 127 (Ohio App. 1997).

Oklahoma

15 Okla. Stat. §
221

1995 OK S.B.
1297

Oklahoma
Oilfield Anti-
Indemnity Act

“a construction agreement that requires an entity or that entity’s insurer to indemnify, insure, defend or hold harmless another entity against liability . . . which arises out of the negligence or fault of the indemnitee . . . is void as against public policy.” § 221

All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another or violation of law, whether willful or negligent, are against the policy of the law. 15 Okl. St. § 212. (statute under which oilfield contracts may be enforced).

Construction statutes – interpreted to also void indemnity via insurance coverage.

Oklahoma has introduced a targeted bill, however, it was not enacted. To date, they effectively limit these agreements via the courts’ interpretations of other indemnity statutes. *See Mohawk Drilling Co. v. McCullough Tool Co* () (invalidating exculpatory contract based on one party’s enjoyment of “much greater bargaining strength”), *Kinthead v. W. Atlas Int’l Inc.* (), and *Arnold Oil Props. V. Schlumberger Tech. Corp.* ()

See also <http://phillipsmurrah.com/2016/01/limiting-liability-in-the-oilfield/> for a great discussion on OK’s case law.

Oregon

Or. Rev. Stat. §
30.140

“any provision in a construction agreement that requires a person (or surety or insurer) to indemnify another against liability for damage arising out of . . . damage to property caused in whole or in part by the negligence of the indemnitee is void.”

The very purposes . . . was to preclude contractors or owners from forcing subcontractors to accept liability for the contractor’s own negligence as part of the

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subcontractor's cost of doing business.
First Mercury Ins. v. Westchester Surplus Lines Ins. Co., 731 Fed. Appx. 716.

Contracting for "additional insured" is allowed under statute.

No known case law applying statute to oilfield contracts.

Pennsylvania

68 P.S. § 491

Every agreement or understanding in, or in connection with any contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect, engineer, surveyor or his agents, servants or employes shall be indemnified or held harmless for damages, claims, losses or expenses including attorneys' fees arising out of: (1) the preparation or approval by an architect, engineer, surveyor or his agents, servants, employees or invitees of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the architect, engineer, surveyor or his agents, servants or employees provided such giving or failure to give is the primary cause of the damage, claim, loss or expense, shall be void as against public policy and wholly unenforceable.

Statute very limited, not much case law interpretation. No current application to the state's oil & gas laws.

Rhode Island

R.I. Gen. Law § 6-34-1

"A[n]. . . agreement. . . in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance. . . . purporting to indemnify the promisee. . . against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence of the promisee, the promisee's independent contractors, agents, employees, or indemnitees, is against public policy and is void. . . ."

Does not affect validity of insurance agreements

Choice of law provisions also voidable for issues surrounding real property located in RI.

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South
Carolina

S.C. Code § 32-2-10

. . . a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance. . . .purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee. . . .is against public policy and unenforceable. .

Contracts providing for indemnity resulting from negligence, whole or part, of indemnitor are excluded.

N/A to insurance contracts

South Dakota

S.D. Codified
Laws § 56-3-18

A[n] agreement or understanding. . . .relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance. . . .purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable.

Sole negligence

Tennessee

Tenn. Code § 62-6-123

A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance. . . .purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees or indemnitee, is against public policy and is void and unenforceable.

Sole negligence

Texas

Tex. Civ. Prac. &
Rem. Code §
127.003

Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining

Must be transaction for “well or mine service”

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**Texas Oilfield
Anti-Indemnity
Act (TOAIA)**

**Tex. Ins. Code §§
151.102-103**

to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:

(1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and

(2) arises from:

(A) personal injury or death;

(B) property injury; or

(C) any other loss, damage, or expense that arises from personal injury, death, or property injury.

Purchasing and transporting gas or other natural materials is excluded, as well as “construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities”

See definitions in § 127.001

Utah

Utah Code § 13-8-1

When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(i), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a), if:

(a) the damages are caused in part by the owner; and

(b) the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).

Does not affect validity of any insurance contract...or agreement issued by admitted insurer.

Vermont

No statute

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Virginia

Va. Code § 11-4.1

Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, [that] . . . purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable. This section applies to such contracts between contractors and any public body, as defined in § 2.2-4301.

Washington

Wash. Rev. Code § 4.24.115

A[n] agreement, or understanding relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estat. . . ., purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:

(a) Caused by or resulting from **the sole negligence** of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;

(b) Caused by or resulting from the **concurrent negligence** of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

Sole negligence, concurrent negligence

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| West Virginia | W.Va. Code § 55-8-14 | A[n]. . . agreement or understanding....relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure, project, development or improvement attached to real estate, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the indemnitee. . . is against public policy and is void and unenforceable and no action shall be maintained thereon. | N/A to construction bonds or insurance contracts or agreements Indemnity provision void only if: indemnitee is found 100% negligent and it cannot be inferred that there was a proper agreement to purchase insurance for the benefit of all concerned. <i>Dalton v. Childress Serv. Corp.</i> , 432 S.E.2d 98 (W. Va. 1993). |
| Wisconsin | Wis. Stat. § 895.447 | Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void. | N/A to insurance contracts or contracts before 7/1/1978 |
| Wyoming | Wyoming Oilfield Anti-Indemnity Act (WOAIA) Wyo. Stat. Ann. § 30-1-131 | All agreements... affecting any agreement pertaining to any well for oil, gas or water, or mine for any mineral. . . .[purports to indemnify for damages resulting from] Death or bodily injury to persons; Injury to property ...are against public policy and are void and unenforceable to the extent that such contract...by its terms purports to relieve the indemnitee from loss or liability for his own negligence. This provision shall not affect the validity of any insurance contract... | <i>Lexington Ins. Co. v. Precision Drilling Co.</i> (10 th Cir. 2016): party barred from directly indemnifying another could nevertheless buy insurance for that other party. |

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**Testimony in Opposition to
SENATE BILL NO. 2319**

Senate Energy and Natural Resources Committee

February 1, 2019

Chairman Unruh, Senate Energy and Natural Resources Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose SB 2319.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, and has been representing the energy industry since 1952.

SB 2319 is not unfamiliar because a bill substantially the same was introduced in the 2011 Session as HB 1166, copy attached. I have also attached for your reference a copy of the Bill Actions for HB 1166 as well as the relevant portion of the Journal of the House, page 295 from the 19th Day, with the House vote defeating HB 1166 by a vote of 27 to 63 with 4 absent and not voting.

SB 2319 provides that an indemnity agreement in oil and gas production contracts are void and unenforceable. NDPC is opposed to SB 2319 for the same reasons as were previously expressed when HB 1166 was defeated in 2011. SB 2319 is an interference with the private rights of parties to contract for indemnification responsibilities. As you may know, "indemnity" is generally defined as a duty, typically arising from a contract, in which one person promises to make good on another's financial loss or liability, resulting from a particular event or contingency.

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NDPC is not aware of any major problem with indemnification provisions in the oil field related contracts that SB 2319 is trying to address or solve that would be any different in any other contractual arrangement.

These types of indemnity arrangements are permitted in other non-oil field related contracts. The parties involved in oil field negotiations should have the same freedom to contract as exists in other contractual arrangements. There does not appear to be a compelling reason for this legislation which would prohibit these indemnity arrangements in a specific area, such as with oil field contracts.

The types of questions that arise with SB 2319 include: Why single out and limit this to only oil field contracts and the oil and gas industry? Who will benefit from such legislation? Is this simply a benefit to the insurance industry? All liability insurance is actually an indemnity contract against one's own negligence, so would it be good public policy to prohibit all liability insurance contracts? Will this legislation result in lower premiums for North Dakota citizens?

SB 2319 simply is not necessary and is an inappropriate interference with the private right of parties to enter into such contracts with indemnity provisions.

In conclusion, NDPC urges your opposition to **SB 2319** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.

11.0213.01000

Sixty-second
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1166

Introduced by

Representatives Klemin, Drovdal, Sukut

Senators Andrist, Lyson, Oehlke

1 A BILL for an Act to create and enact a new section to chapter 38-01 of the North Dakota
2 Century Code, relating to indemnity agreements in oil and gas production contracts.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new section to chapter 38-01 of the North Dakota Century Code is created
5 and enacted as follows:

6 **Indemnity agreement in oil and gas production contracts void.**

- 7 1. An agreement, covenant, or promise contained in, collateral to, or affecting an
8 agreement pertaining to a well for oil or gas which purports to indemnify the
9 indemnitee against loss or liability for damages for death, bodily injury, or injury to
10 property is against public policy and void and unenforceable to the extent the contract
11 of indemnity by its terms purports to relieve the indemnitee from loss or liability for:
 - 12 a. The indemnitee's own negligence;
 - 13 b. The negligence of the indemnitee's agents or employees or an independent
14 contractor who is directly responsible to the indemnitee; or
 - 15 c. An accident that occurs in operations carried on at the direction or under the
16 supervision of the indemnitee or an employee or representative of the indemnitee
17 or in accordance with methods and means specified by the indemnitee or an
18 employee or representative of the indemnitee.
- 19 2. As used in this section, "agreement pertaining to a well for oil or gas" means an
20 agreement or understanding, written or oral, concerning operations relating to drilling,
21 deepening, reworking, repairing, improving, testing, treating, perforating, acidizing,
22 logging, conditioning, altering, plugging, or otherwise rendering services in or in
23 connection with a well drilled for the purpose of producing or disposing of oil or gas, or
24 an agreement to perform any portion of any such work or services or any act collateral

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Legislative Assembly

- 1 thereto, including the furnishing or rental of equipment, incidental transportation, or
- 2 other goods and services furnished in connection with any such service or operation.
- 3 3. This section does not affect the validity of an insurance contract or a benefit conferred
- 4 by the workforce safety and insurance laws of this state.
- 5 4. This section does not deprive an owner of the surface estate of the right to secure an
- 6 indemnity from a lessee, operator, contractor, or other person conducting operations
- 7 for the exploration or production of oil and gas on the owner's land.

North Dakota Legislative Branch

Measure Actions

2011
Session

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Send me to Measure No. (9999):

Introduced by Rep. Klemin, Drovdal, Sukut
Introduced by Sen. Andrist, Lyson, Oehlke

A BILL for an Act to create and enact a new section to chapter 38-01 of the North Dakota Century Code, relating to indemnity agreements in oil and gas production contracts.

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| | | | |
|-------|-------|---|--------|
| 01/06 | House | Introduced, first reading, referred Judiciary Committee | HJ 85 |
| 01/17 | | Committee Hearing 09:00 | |
| 01/27 | House | Reported back, do pass, place on calendar 7 6 1 | HJ 268 |
| 01/31 | House | Second reading, failed to pass, yeas 27 nays 63 | HJ 295 |

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19th DAY

MONDAY, JANUARY 31, 2011

295

SECOND READING OF HOUSE BILL

HB 1151: A BILL for an Act to amend and reenact sections 35-13-02 and 35-13-03 of the North Dakota Century Code, relating to filing deadlines for a repairman's lien.

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO NOT PASS, the roll was called and there were 17 YEAS, 73 NAYS, 0 EXCUSED, 4 ABSENT AND NOT VOTING.

YEAS: Beadle; Boehning; Clark; Conklin; Froseth; Hunsakor; Kempenich; Kreidt; Monson; Nelson, M.; Owens; Ruby; Skarphol; Sukut; Trottier; Weiler; Speaker Drovdal

NAYS: Amerman; Anderson; Bellew; Belter; Boe; Brabandt; Brandenburg; Carlson; Dahl; Damschen; DeKrey; Delmore; Delzer; Devlin; Dosch; Frantsvog; Grande; Gruchalla; Guggisberg; Hanson; Hatlestad; Hawken; Headland; Heilman; Heller; Hofstad; Hogan; Holman; Johnson, D.; Johnson, N.; Kaldor; Karls; Kasper; Keiser; Kelsch, R.; Kelsch, J.; Kelsch, S.; Kilichowski; Klein; Klemin; Koppelman; Kretschmar; Kreun; Kroeber; Maragos; Martinson; Meier, L.; Metcalf; Meyer, S.; Mock; Mueller; Nathe; Nelson, J.; Onstad; Paur; Pietsch; Pollert; Porter; Rohr; Sanford; Schatz; Schmidt; Steiner; Streyle; Thoreson; Vigasaa; Wall; Weisz; Wieland; Williams; Winrich; Wrangham; Zaiser

ABSENT AND NOT VOTING: Glassheim; Kingsbury; Louser; Rust

HB 1151 lost.

SECOND READING OF HOUSE BILL

HB 1166: A BILL for an Act to create and enact a new section to chapter 38-01 of the North Dakota Century Code, relating to indemnity agreements in oil and gas production contracts.

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 27 YEAS, 63 NAYS, 0 EXCUSED, 4 ABSENT AND NOT VOTING.

YEAS: Amerman; Conklin; DeKrey; Dosch; Frantsvog; Guggisberg; Hatlestad; Heller; Hogan; Hunsakor; Kaldor; Keiser; Kilichowski; Klein; Klemin; Koppelman; Kreidt; Meier, L.; Monson; Onstad; Pietsch; Steiner; Sukut; Wall; Weisz; Williams; Speaker Drovdal

NAYS: Anderson; Beadle; Bellew; Belter; Boe; Boehning; Brabandt; Brandenburg; Carlson; Clark; Dahl; Damschen; Delmore; Delzer; Devlin; Froseth; Grande; Gruchalla; Hanson; Hawken; Headland; Heilman; Hofstad; Holman; Johnson, D.; Johnson, N.; Karls; Kasper; Kelsch, R.; Kelsch, J.; Kelsch, S.; Kempenich; Kretschmar; Kreun; Kroeber; Maragos; Martinson; Metcalf; Meyer, S.; Mock; Mueller; Nathe; Nelson, J.; Nelson, M.; Owens; Paur; Pollert; Porter; Rohr; Ruby; Sanford; Schatz; Schmidt; Skarphol; Streyle; Thoreson; Trottier; Vigasaa; Weiler; Wieland; Winrich; Wrangham; Zaiser

ABSENT AND NOT VOTING: Glassheim; Kingsbury; Louser; Rust

HB 1166 lost.

SECOND READING OF HOUSE BILL

HB 1244: A BILL for an Act to amend and reenact section 36-24-08 of the North Dakota Century Code, relating to rules governing the preparation of equine carcasses.

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The following is a link to the Louisiana Law Blog titled, "Understanding Similarities and Difference in Four Oilfield Anti-Indemnity Acts", Louisiana, Texas, Wyoming and New Mexico.

<https://www.louisianalawblog.com/oil-gas/understanding-similarities-differences-four-oilfield-anti-indemnity-acts/>

As you review all four states, there are limitations to the provision in each state's Act:

1. Some limits to only people injury or death
2. Some limits to only well sites, not gas plants or pipelines.
3. Texas provides if insurance acquired, then no prohibition.
4. Louisiana only people injury or death at a well site.
5. New Mexico only production activities at the well head.
6. Wyoming limited to wells only.

1. **Reciprocal Indemnity**—A typical practice between companies and contractors in North Dakota is the use of Reciprocal indemnity agreements AKA “Knock for Knock” indemnity.
 - a. Under this indemnity arrangement each of the parties is responsible for damages to their own people and property, regardless of who caused it. This indemnity agreement is almost always preferred by contractors as a means to manage their overall risk.
 - b. Contractors (especially smaller contractors) benefit from this arrangement because 1) they are better able to insure their own liability (they know who their people are and what their equipment is), and 2) they avoid potentially catastrophic liability if their employee causes the destruction of a multimillion-dollar facility for a \$100,000 or less contract.
 - c. This indemnity structure in some cases may actually shift more real-dollar risk onto operators, but most people in the industry argue that this is appropriate because 1) operators are in a better position to insure their large facilities, and 2) operators generally have greater resources than contractors to respond to major catastrophic events (even if “caused” by the contractor).
 - d. Common indemnity structures prevent lengthy and expensive fact-based blame fighting in favor of the party in the most immediate control of their situation (the contractor) assuming the risk for their people and employees, which are both insurable at a reasonable cost. At this point, all contractors have stop work authority in the oil and gas industry, and they are the ones performing the work on the ground and in the best position to evaluate and insure against their own risks.
 - e. Further, any insurance costs are passed on to the operator in the charges for the services being provided. Prohibiting an operator from requiring a contractor to indemnify the operator for the contractor’s employees and property is tantamount to making someone pay for insurance (through the service charges) and then telling them they can’t use it (because indemnities are prohibited), which sounds great if I’m an insurance company.
 - f. This risk structure is designed to eliminate the need to double insure for certain types of exposure and thereby keep overall costs lower.
2. Since sound safety training prevents accidents and reduces risk, the MSA also includes all the **safety training requirements** that contractors are mandated to complete prior to working on an oil and gas site.
 - a. Required to complete 8-10 hours of safety orientation from PEC/OSHA plus 4-6 hours of ONE BASIN-*One Way!* safety awareness.
 - b. Complete several training courses on specific safety topics.
 - c. Complete site-specific job training and procedure familiarization necessary to do the job safely and with proper personal protective equipment.
 - d. Worth repeating: All contractors have stop work authority in the oil and gas industry, and they are the ones performing the work on the ground and in the best position to evaluate and insure against their own risks.

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NEWS RELEASE

FOR IMMEDIATE RELEASE

February 4, 2019



ONE BASIN- *One Way!* announces standardized contractor orientation program and providers

Bismarck, N.D. – The North Dakota Petroleum Council is proud to announce the launch of **ONE BASIN- *One Way!***, a standardized contractor safety orientation program. The **ONE BASIN- *One Way!*** advisory committee has selected the North Dakota Safety Council, TrainND Northwest, and Diamond B to provide the standardized training.

Currently, contractors for the oil and gas industry must meet orientation and training requirements for each company they perform work for throughout the year. The average contractor sits through 4-8 orientations, with similar material being presented each time. This adds up to almost 1.25 million lost manhours due to redundant training. Members of the North Dakota Petroleum Council (NDPC) identified this duplicative training as an area they could increase efficiency. Last spring, they began developing a standardized orientation program with input from 99 committee members including producers, contractors and training providers.

These efforts produced the **ONE BASIN- *One Way!*** program, an orientation program that covers safety orientation at all producer’s sites. This will eliminate the need for contractors to sit through hours of orientations at every site where they work. Simplifying what contractors need to learn will also lead to a better understanding of the rules and guidelines at all sites, safer work practices, and fewer injuries. By consolidating these individual programs into one program delivering fifty five prominent safety topics, the **ONE BASIN- *One Way!*** program will deliver a robust safety orientation while concentrating on improving the overall industry safety record.

To provide the training, the **ONE BASIN- *One Way!*** advisory committee selected the North Dakota Safety Council, TrainND Northwest, and Diamond B.

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The **North Dakota Safety Council (NDSC)** is a private non-profit whose mission is to reduce injuries and save lives through effective training techniques in a diverse lineup of courses. The NDSC provides training all across the region utilizing 11 full- and part-time safety consultants. The NDSC has a proven track record with standardized safety training due to its work with the Energy Coalition for Contractor Safety (ECCS).

TrainND Northwest is a training organization with a mission to provide North Dakota with a safe and highly skilled workforce. TrainND NW is located in Williston, ND, and is powered by Williston State College. They have a proven track record of delivering contractor orientations and building custom trainings. TrainND has multiple trainers on staff with a passion for safety and a wealth of experience in the oil & gas industry.

Diamond B has an office in Fargo, ND with a large presence in the Bakken. They developed a software platform called ProCertX which was built specifically for the training and certification challenges subcontractors and producers face. ProCertX delivers value-added solutions that reduce administrative workload through a highly scalable, modern, cloud-based solution.

This coalition will provide training as well as database management to assist companies and contractors in tracking who has attended training and when it must be completed again. The North Dakota Petroleum Council is encouraging all its members to join the **ONE BASIN- One Way!** program so we can see increased efficiencies and safety across the oil and gas workforce in North Dakota. **ONE BASIN- One Way!** will have a formal kickoff on February 19, 2019, in conjunction with the NDSC annual safety conference.

-###-

About the North Dakota Petroleum Council

Since 1952, the Petroleum Council has been the primary voice of the oil and gas industry in North Dakota. The Petroleum Council represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, mineral leasing, consulting, legal work, and oil field service activities in North Dakota, South Dakota, and the Rocky Mountain Region. For more information, go to www.ndoil.org.

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Director of Communications



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EnergyOfNorthDakota.com | NDOil.org





TrainND will be part of effort to standardize safety, orientation program for Bakken Oil Patch

One Basin One Way program unveiled by North Dakota Petroleum Council

By Renée Jean rjean@willistonherald.com
Feb 5, 2019 Updated 23 hrs ago

TrainND in Williston is one of two entities statewide that will be offering a new standardized safety and orientation program for oilfield workers in the Bakken.

The program is called One Basin One way, and is being launched by the North Dakota Petroleum Council. It will help standardize training throughout the Bakken, as well as eliminate what has been duplicative training for thousands of workers.

“This is such a great opportunity for us,” said Kenley Nebeker, director for Technical Programs and Training at Williston State College, which includes the TrainND program. “We are all about safety and ensuring that our workforce is going to work confident and well-trained. This fits very well into our mission, and we really believe in the goals of this orientation.”

The new program is the result of a “grass roots” effort by the North Dakota Petroleum Council, Nebeker added.

Every year, contractors find themselves sitting through a multitude of required safety and orientation programs for each of the companies they work for. These programs are all similar, however.

The North Dakota Petroleum Council estimates workers are sitting through as many as eight redundant sessions a year and that companies are collectively losing 1.25 million manhours. Last spring, they set up a committee of 99 members, including producers, contractors and training providers, to develop a program that would help improve the training and eliminate inefficiencies. The result was the One Basin One Way program.

Kari Cutting, vice president of the North Dakota Petroleum Council, said she believes the program will not only help increase workforce efficiency, but that it could also help improve the overall safety record for the industry.

“The utility industry in North Dakota started a similar program in 1996,” she said. “When they standardized the safety training and requirements, their safety record

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improved dramatically. We weren't even looking necessarily for that originally in our discussion, but when that came through, that this could lead to better safety statistics, it was just a no-brainer to try and standardize."

Nebeker is heading up the development team that's writing the new orientation and safety program.

"We want something that is highly engaging, and that is really how we sold ourselves," Nebeker said. "This will not be death by Powerpoint."

The new program will include 55 prominent safety topics and will be offered by both TrainND and the North Dakota Safety Council. A third entity, Diamond B, will be providing a tracking system for certifications in the One Way program.

"They will provide the technology needed to ensure the certifications are going on the contractors' cards," Nebeker said. "So when they go on site and need certain certifications, diamond B has a program that makes tracking that utterly amazing. Their technology is mind-blowing. I'm excited to be partnered with them."

The North Dakota Petroleum Council, meanwhile, is working on getting more companies signed up for the program.

"We are excited by what we are seeing so far for signups," Nebeker said. "We'll have a good idea by Feb. 19 who is on board and who is not. But I can see that continuing to grow. I think a lot of producers are anxious to see how this goes and what the final product looks like."