Protect Yourself and Your Business with Indemnification Understanding

Sarah Sawyer: Welcome to this week's OK at Work, myself, Sarah Sawyer, my colleague Russell Berger, both attorneys at Offit Kurman, and today we are talking about indemnification. So this is a clause that people might see in contracts pretty frequently, but maybe not quite sure what it means and why it's in there, and really the implications of it.

And there are some big implications to it potentially. Let's just start. What is an indemnification clause, Russell?

Russell Berger: Yeah so the concept of indemnification really means that, if I get sued for something by a third party, you are going to be responsible for my cost. If I have to pay the other side, you are going to own that responsibility.

And often, they're are ways it can be transferred not through a contract, but the most common way it gets transferred is through a contract. When you engage in a contract with somebody, it might say, if I get sued because of something that you've done, then you're going to indemnify me, pay for my [00:01:00] defense pay the other side if need be, so that I don't absorb any of this liability, ultimately.

Sarah Sawyer: We see this in a lot of different contexts, in employment cases, in mergers and acquisitions and other types of business dealings and contracts. And there might be limitations on that indemnification as well. So saying, you're going to indemnify me up to a certain amount or under certain circumstances, or you need to provide me notice by a certain time if you want to enforce these provisions.

So there are actually a really meaty part of these contracts, and they're often towards the bottom of the contract, I find. So people just skip over them a lot.

Russell Berger: Yeah, that's right. Because they're boilerplate on one level. But they're important boilerplate. It's there for a reason and there can be subtle tweaks to that language that can have significant outcomes as you're referring to.

So you want to know what's in there and you want to be thoughtful about, maybe I can subtly tweak this in a way that's more favorable to me.

Sarah Sawyer: Yeah. And I've seen situations even in a mergers and acquisition seal, for instance. You might be getting a really great deal on a business, [00:02:00] but if those indemnity clauses aren't tight and you don't have good structure around them, you could end up paying more in an indemnity claim than you do for the business itself.

That's just one example of how important these clauses can be. Because they can really hit the pocketbook.

Russell Berger: Yeah. One of the things that I see a little bit more frequently and didn't use to be an issue is, transferring of risk with respect to paying employees properly. Most states now, at least on the east coast, have statutes that talk about in the contracting context, especially in construction where up the chain contractors are going to be responsible for proper wage payment to the downstream subcontractors employees. Allocating that risk and making sure that, you're protected both upstream and downstream can be really important as well.

Sarah Sawyer: Yeah. So main takeaway. Don't ignore it like it's a boilerplate, end of the contract, throw away. Definitely take a look, know what you're getting into and what the potential exposure might be.

Russell Berger: Yeah, absolutely. These things matter and it's important to be on top of that.

Sarah Sawyer: Well, thanks Russell, and we'll see [00:03:00] you next time.

Russell Berger: Thanks, Sarah.