Indemnity clauses

Quick guide

- Consider requesting the indemnity clauses be removed from medical employment contracts
- Check to see which elements are covered or not covered by your Professional indemnity policy.

What is an indemnity clause?

An indemnity clause allocates legal responsibility/liability between the parties to the contract. In the case of a medical services contract, these parties are typically the medical practice or hospital and the medical practitioner.

An indemnity clause explains who is responsible to an injured party in the case of a claim against the medical practitioner, the practice or both parties.

Does there need to be an indemnity clause in a medical services contract?

The law does not require an indemnity clause to be included in a medical services contract. As a first step, we recommend that you ask for the indemnity clause to be removed.

In most cases of medical negligence, legal responsibility is adequately determined under the general law. For example, take the case of a negligent failure to diagnose cancer caused partly by the radiology practice not sending a test result and partly by a medical practitioner not following up the sample that was sent for testing. Under the general law, the radiology practice and the medical practitioner will be jointly responsible.

If a contract does not expressly allocate responsibility, each party's liability will be determined according to the general law and the particular facts of a case.

Why are indemnity clauses included in medical services contracts?

Indemnity clauses are typically included in a medical services contract to shift liability from the party who would ordinarily be responsible under the general law onto the other party to the contract.

Typically, liability is shifted from the practice to the medical practitioner. In some cases, the clause may allocate responsibility depending on the role of the practice and the medical practitioner in the relevant incident.

For example, if a medical practitioner instructs a receptionist at a practice to send a letter and the receptionist does not send the letter or sends it to the wrong address, the practice would, under the general law, be partly responsible for the failure to follow up with the patient. An indemnity clause may allocate full responsibility for the failure to follow up with the patient to the medical practitioner.

Indemnity clauses are usually very broad and are not limited to claims arising from medical negligence. They may also include public liability and product liability claims, breach of contract claims and claims from a person other than a patient. These types of claims are not ordinarily covered under a professional indemnity policy.

Many medical service contracts seek an indemnity for the practice's statutory liability (such as shared debts under the shared debt recovery scheme, payroll tax and superannuation). These matters are not covered under your Avant policy.

The drafting and interpretation of indemnity clauses is a very complex area of law. There is conflicting law about how to interpret indemnity clauses.

What are you covered for under your Avant policy?

It is important for you to understand what you are and are not covered for under your Avant Practitioner Indemnity Insurance Policy or your Practice Indemnity Insurance Policy so that you know what liabilities you are assuming when you sign an indemnity clause in a contract.

Avant's Practitioner Indemnity Insurance Policy generally only covers matters arising from your provision of healthcare, which is subject to the terms, conditions and exclusions of your policy. This means that you are covered for things including, breaches of privacy, disciplinary board proceedings, criminal proceedings, investigations by the coroner or a commission etc. Your Practitioner policy does not cover you for things like:

- property damage (for example, if you accidentally or intentionally damage practice equipment)
- public liability (for example, a patient tripping over your bag)
- workers compensation liability

- claims which arise from a liability that you assume by contract, waiver, guarantee or warranty, unless they would have had this liability in the absence of these.

You may wish to obtain other insurance to cover matters that are not covered by your Avant policy.

It is important to read your policy documents and understand your cover, as your policy may not cover everything that you assume responsibility for under the indemnity clause. If you are unsure of what you need and would like to discuss your coverage and options, you can contact us on 1800 128 268.

Summary

The law does not require an indemnity clause to be included in a medical services contract.

An indemnity clause will not necessarily be called an indemnity clause. For example it may be called 'an exclusion of risk clause'.

You should carefully read any clauses in your proposed contract which allocate responsibility between the parties.

Ideally, an indemnity clause should reflect the position under the general law. It should not seek to shift liability from a practice to a medical practitioner so that the practitioner takes on more legal responsibility than they would have otherwise.

If a medical practice or hospital will not agree to remove the indemnity clause, we recommend that the clause should:

- be limited to the provision of healthcare by the medical practitioner or practice to patients
- be limited to negligent acts or omissions caused by the medical practitioner or practice
- be reciprocal
- be qualified, so that one party's liability is reduced to the extent that it is caused or contributed to by the other party.

Remember that cover under your insurance policy with Avant will not extend to cover liability that you take on under a contract if that liability is beyond what you would have under the general law.

We strongly recommend that you obtain advice before signing a contract.

For more information or immediate medico-legal advice, call us on **1800 128 268**, 24/7 in emergencies.
avant.org.au/mlas

avant.org.au/avant-learning-centre