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## FIVE PROVISIONS THAT SHOULD GET EXTRA ATTENTION DURING YOUR 2025 CONTRACTS REVIEW

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The past two years have ushered in substantial changes to Minnesota laws that affect the construction industry, creating new and significant risks for contractors. In addition to these legislative developments, evolving threats—such as those posed by cybercriminals—demand attention. These new realities require a thorough reevaluation of contracts and their provisions. Below are five key considerations for industry professionals:

### **1. Anti-Indemnity.**

In 2023, Minnesota’s Anti-Indemnity Statute underwent a notable amendment. The primary change was the inclusion of the term “defend” in the definition of “indemnification agreement” under Minn. Stat. § 337.01, Subd. 3.<sup>i</sup> This modification means that a promisor (e.g., property owner or general contractor) can no longer require a promisee (e.g., subcontractor) to defend them against costs not stemming from the promisee’s wrongful acts.<sup>ii</sup>

Previously, a promisee could be required to pay defense costs for both the promisee and the promisor, at least until a final determination on the liability was made. As detailed in an article we published back in June 2023 titled “[An Important Change to Minnesota’s Anti-Indemnity Statute and What It Means for Minnesota Construction Companies](#)”, this is no longer the case.<sup>iii</sup> Setting aside the concerns about the practicalities of the new anti-indemnity statute, there are a number of ways that contractors can tailor their contracts to make sure that a contractor is not stuck paying significant defense costs because it’s been added to a dispute through no fault of its own. These provisions can include agreements to participate in early and discrete arbitration, the purchase of specific insurance products, etc.

### **2. Defense, Indemnity, and Hold Harmless Clauses to Protect against Cyber Threats.**

The construction industry, like others, faces increasing risks from cyberattacks—such as data breaches, ransomware, and intellectual property theft. Beyond general concerns, the industry is vulnerable to specific threats: ransomware-induced project delays, insolvency from ransom payments or fraudulent transfers, business disruptions from system breaches, and financial liability for exposed intellectual property or personal data.

Given these growing threats, construction contracts should include robust provisions requiring third-party vendors, subcontractors, and other stakeholders to take reasonable measures to protect data. This may include securing cyber insurance, requiring two-step authentication on certain project files, and proof that there are certain cyber threat management policies in place.

For guidance, the National Institute of Standards and Technology offers resources on managing information security and privacy risks—valuable for organizations of any size.

### **3. Wage Theft.**

On August 1, 2023, revisions to the Minnesota Wage Theft Prevention Act (“WTPA”) took effect. Considered among the strictest in the nation, the changes impose civil and criminal penalties on employers who violate the WTPA.<sup>iv</sup> Our colleague Beth LaCanne discusses all of these changes, as well as relevant provisions and requirements of the WTPA in greater detail in [“Tightening the Screws on Wage Theft: Minnesota’s Wage Theft Prevention Act”](#). The following, however, directly relates to the construction industry.

Under the revised WTPA, a contractor may be held liable if a subcontractor fails to pay its employees their wages or benefits. Conventional wisdom would be that a contractor can require its subcontractors to defend, indemnify, and hold harmless the contractor for a subcontractor’s failure to comply with the WTPA. Unfortunately, any contract clause attempting to indemnify, release, or transfer this liability is unenforceable.

Contractors can mitigate their exposure by requiring subcontractors to provide payroll records upon request and by reserving the right to recover damages from a subcontractor following a wage claim resolution.<sup>v</sup> However, these provisions do not apply to work covered by prevailing wage rates or where a contractor and subcontractor have a bona fide collective bargaining agreement (“CBA”) with a labor organization. The CBA must address wage recovery and unpaid fringe benefit contributions.

Additionally, changes to Minn. Stat. § 181.723 introduce a new, more stringent test for classifying independent contractors, effective March 1, 2025. Contractors will be required to retain records for three years to justify their classification decisions.

To mitigate potential risks, contracts should require downstream parties to verify they have reviewed the WTPA, understand the new classification test, and represent and warrant in the parties’ contract of their independent contractor status.

### **4. Changes to Insurance Restoration Agreements.**

On August 1, 2024, revisions to Minn. Stat. § 325E.66 took effect, governing “subject to” or “price agreeable” contracts between contractors and homeowners. These agreements typically cover insurance-paid restoration projects, such as roof repairs following storm damage.

The revisions prohibit contractors from (1) offering compensation in exchange for an inspection, assistance with an insurance claim, or referrals; (2) signing agreements without first providing a good-faith estimate of the project’s costs; and (3) failing to disclose these requirements alongside the estimate.<sup>vi</sup>

There is much debate about what constitutes a “good faith estimate”, but we are advising our clients that the estimate is going to be considered made in good faith if it is itemized and is one

that, if accepted, the contractor would make a part of its contract. We are also advising our clients that they must include a copy of Section 325E.66 in their restoration agreements.

## 5. Non-Compete Agreements.

Minnesota’s stance on non-compete agreements has shifted dramatically, with the state barring their enforcement as of July 1, 2023. Federal changes are also in motion. The Federal Trade Commission’s (“FTC”) rule banning non-compete clauses under the Federal Trade Commission Act (“FTCA”), issued on April 23, 2024, has faced challenges in various circuit courts and will likely be reviewed by the U.S. Supreme Court in the next term. For more on this issue, see our colleague Bryce Riddle’s discussion of the FTC non-compete ban in “[Changes to Existing Laws Going Into Effect July 1, 2023](#)”.<sup>vii</sup>

While Minnesota’s law bans non-competes, this restriction does not apply to agreements executed before July 1, 2023. Additionally, non-solicitation and non-disclosure agreements remain enforceable.<sup>viii</sup> At Bassford Remele, we advise our clients to remove non-compete provisions from contracts to comply with Minnesota law while continuing to honor non-disclosure agreements.

## Conclusion

Minnesota’s evolving legal landscape presents new challenges for the construction industry, but it also offers opportunities for those who proactively adapt. By revising contracts to reflect changes in anti-indemnity laws, cybersecurity threats, wage theft protections, insurance restoration agreement laws, and non-compete provisions, construction companies can mitigate risks, ensure compliance, and seize new avenues for growth.

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<sup>i</sup> Minn. Stat. § 337.01, subd. 3.

<sup>ii</sup> Kyle S. Willems, James C. Kovacs. *An Important Change to Minnesota’s Anti-Indemnity Statute And What It Means For Minnesota Construction Companies*, Bassford Remele P.A., June 2023, at 2.

<sup>iii</sup> *Id.*; See Minn. Stat. § 337.01, subd. 1 and § 15.71, which defines “indemnification agreement” for public construction contracts. The legislature also amended Sections 15.71 and 15.72, so that the definitions for “indemnification” and “promisee” are identical for contracts relating to public and private projects.

<sup>iv</sup> Beth L. LaCanne, *Tightening The Screws On Wage Theft: Minnesota’s Wage Theft Prevention Act*, Bassford Remele, P.A., June 2023.

<sup>v</sup> *Id.* at 4; see also Minn. Stat. § 181.165.

<sup>vi</sup> Minn. Stat. § 325E.66

<sup>vii</sup> Bryce D. Riddle, *Changes to Existing Laws Going Into Effect July 1, 2023*, The Work Week, Bassford Remele, P.A., June 26, 2023.

<sup>viii</sup> Riddle, *supra*, at 2.