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## **The New Mexico Oilfield Anti Indemnity Act and The Texas Oilfield Anti-Indemnity Act**

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## **The New Mexico Oilfield Anti Indemnity Act and The Texas Oilfield Anti-Indemnity Act**

By: David Lauritzen, Ty Lyon, Sarah Judge

It is a fact of life that work in the oil field is dangerous. In 2021, OSHA statistics indicate that there were over 3,600 reportable injuries to employees across the up-stream, mid-stream, and down-stream sectors in the oil and gas industry.<sup>1</sup> OSHA further reports that in 2021, there were over 70 fatalities in the industry.<sup>2</sup> In light of these numbers, it is no surprise that well owners, operators, and subcontractors all seek to try to protect themselves from the inevitability of personal injury litigation by injured employees. As a result, over the years the oil and gas industry developed “knock-for-knock” indemnity clauses. These clauses essentially require the parties to a contract to indemnify each other for their own sole or concurrent negligence in the instance that one party’s employee initiates a personal injury suit. Anyone who has spent any time litigating in the oil and gas industry is likely familiar with such clauses. Nominally, these clauses are designed to have the effect of requiring the injured employee’s employer take care of the employee, regardless of whether the employer was actually negligent or if another party at the wellsite was actually responsible. However, this scheme had glaring issues, such as when small contractors were not able to handle the financial strain of having to pay out large verdicts and settlements, or when parties felt they did not have to implement appropriate safety measures because they were indemnified. Often, this also resulted in “unilateral” indemnification obligations, requiring contractors to indemnify owners or operators for the latter’s sole or concurrent negligence without receiving the reciprocal obligation expected in a knock-for-knock clause. In response, some states have sought to manage this issue by regulating these indemnity clauses.

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<sup>1</sup>[case-and-demographic-characteristics-table-r9-2021-2022.xlsx \(live.com\)](https://www.bls.gov/iif/oshwc/osh/os/case-and-demographic-characteristics-table-r9-2021-2022.xlsx)

<sup>2</sup> <https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-table-a-1-2021.htm>.

Texas and New Mexico are two of these states. While not often recognized for having all that much in common with each other, one thing the two states do share in common is the oil-rich Permian Basin, as well as all the on the job injuries which come with the oil and gas industry. To manage the type of indemnify agreements described above, Texas and New Mexico have passed the Texas Oilfield Anti-Indemnity Act (TOAIA) and the New Mexico Oilfield Anti-Indemnity Act (NMOAIA), respectively. While similar in name, considering their states of origin, it is no surprise that the (TOAIA) and the (NMOAIA) have striking differences in statutory language, leading to quite inapposite outcomes for parties seeking to utilize indemnity agreements. This paper will explore the similarities and distinctions in the two statutes to assist practitioners in navigating them. Both statutes have numerous implications for both clients and practitioners, ranging from drafting of contracts at the beginning of an endeavor to a final assessment of liability. Compliance with these statutes can be a million-dollar difference.

Conveniently, the TOAIA and the NMOAIA both require a similar, multi-step process to determine their applicability. First, the statutes require a determination of whether the “agreement” at issue pertains “to a well for oil, gas, or water or to a mine for a mineral.”<sup>3</sup> Then, both statutes ask whether the agreement calls for an agreement wherein the indemnitor will indemnify the indemnitee for the indemnitee’s own sole or concurrent negligence.<sup>4</sup> While the statutes nominally agree on the implications of the answer to this question, the statutes’ exceptions (or lack thereof) prove to be a difference maker. Finally, the TOAIA and NMOAIA each have one last non-statutory hurdle to clear before a court will allow an indemnitee to be indemnified for their sole or concurrent negligence.

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<sup>3</sup> See N.M. Stat. Ann. § 56-7-2(A) (West) and TEX. CIV. PRAC. & REM. CODE ANN. § 127.003 (West).

<sup>4</sup> N.M. Stat. Ann. § 56-7-2(A)(1)-(3) (West); TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001(6), 127.003(a)(1) (West).

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