

GUIDE TO REVIEWING CONTRACTS

INTRODUCTION TO CONTRACTS AT [COMPANY]

WHAT IS A CONTRACT?

A contract is a promise. In legal terms, it is an agreement that the law will enforce which contains a promise to act or not act in a certain way at some time in the future. A contract can be a lengthy document or it can be a brief proposal, a “letter of intent,” a “memorandum of understanding,” or even a purchase order. Whatever its form, to be valid, the parties must have bargained, or had a “meeting of the minds,” about the purpose and scope of their promises.

DOES A CONTRACT HAVE TO BE IN WRITING?

Contracts can be oral or written, but for obvious reasons, written contracts are preferred. Certain types of contracts must be in writing to be enforceable (e.g. contracts for the sale of real estate).

WHEN DOES A CONTRACT GO INTO EFFECT?

To be legally binding, the contract must be signed (“executed”) by each party. The person signing must have the authority to do so on behalf of his or her company; otherwise, the contract may not be valid. [COMPANY] has a written policy about who can sign contracts (attached) of varying dollar amounts.

HOW IS A CONTRACT NEGOTIATED AND DRAFTED?

Usually, one party comes to the other with a proposal or an idea that will benefit both of them (an “offer”). Over a period of time (days, weeks, or even months), the parties discuss the proposal and offer each other revisions or suggestions about changing the proposal so it would work best for them (“counteroffers”). After all the modifications have been made and each party agrees on all the terms, conditions, and wording of the proposal (“acceptance”), they each sign (“execute”) the contract and it goes into effect.

WHAT ARE THE BASIC PARTS OF A CONTRACT?

All contracts, whether long or short, should answer the following questions. This list can also help you in thinking about, negotiating, and drafting a contract, to make sure that the basics have been covered:

1. Who are the parties to the contract? Are they individuals or corporations? What is each party's official legal name and address?
2. What is the purpose of the agreement? Why are the parties doing business with each other? What does [COMPANY] expect to get out of the agreement?
3. Who is going to do what? When are they going to do it? Describe what each party is promising to do in as much detail as possible.
4. Is one party going to provide the other with a product or service? Describe the product or service as specifically as possible. Is there a guarantee or warranty for the product or service – will it do what it is supposed to do? What if it doesn't?
5. If the other party is providing [COMPANY] with a written product, photo, video, artwork, etc., what rights are you buying? Can [COMPANY] use the photo just one time or as many times as needed? Is [COMPANY] the only organization that can use the photo or is it available to other groups? Can the artwork be used only in a printed format (magazine, brochure, or newsletter), or can it also be used on [COMPANY]'s WWW site?
6. How much will the good or service cost? When is the money due? Are installment payments involved? Is there a limit or cap on what one party has to pay? Can you get all or some of the money back if necessary? Under what conditions?
7. How long a period does the contract cover? When does it end? At the end of that time, what happens? Can the agreement be renewed? Is the renewal automatic or do the parties have to agree on whether or not they want to renew? How long is the renewal period?
8. A good contract anticipates potential problems. What happens if one party doesn't do what it is supposed to or is unhappy about the product or service supplied by other party? What other problems can you anticipate occurring? How can they be resolved?

WHEN DOES A CONTRACT TERMINATE?

A contract can be terminated in several ways: The parties can agree to end their relationship, for example, if the contract's purpose has been achieved. Sometimes the contract is terminated because one party cannot, will not, or does not hold up to its end of the bargain; in other words, the contract is breached.

WHAT CAN BE DONE ABOUT A “BREACH”? WHAT IF PROBLEMS OCCUR DURING THE CONTRACT?

In developing a contract or negotiating one, you should realize that the topic of breach, or what can go wrong is one of the most important tissues to consider and discuss before a contract is signed or even drafted. Each party should consider how it might be harmed if the other party doesn't do as it promised, and figure out what type of compensation, whether money or some other remedy, would make up for this harm. Is money an adequate substitute for the harm, for example, in a case when it is easy to buy a replacement product? If so, how much money is enough to obtain a substitute? Are there additional costs of having to start over again and find a substitute? Is the product or service that is the subject of the contract unique or so unusual that only it will do (e.g. a certain piece of real estate)? If the cost of remedying the harm cannot be figured out in the beginning, can the parties come up with an estimate that would compensate for the damage caused (“liquidated damages”).

In the even that an actual breach of contract does occur, the first thing you should do is read the contract to see what it says about the problem. For example, it may require the unhappy party to inform the other party within a certain time that its performance is not adequate. Or the party causing the problem may not be entitled to be paid if it doesn't fix the problem by a certain time. Depending on the circumstances, you may want to contact the other party and try to resolve the problem informally, or try to modify the contract to eliminate the problem. Before doing so, however, you should consult with the Law Department to make sure that [COMPANY]'s interests are fully protected.

Because of the significant time and expenses involved, bringing a lawsuit against the breaching party is usually a last resort. When there is a dispute about a contract, usually the parties can agree on ways to resolve the disagreement without going to court, either by ending or shortening their relationship, by agreeing on what amount of money is owed to whom by whom, or by coming up with ways to modify their original promises to avoid similar problems in the future.

CAN A CONTRACT THAT IS ALREADY SIGNED BE CHANGED?

If the parties think it is necessary, they can negotiate and draft a document that changes the terms of the original agreement. These changes can be in the form of an “addendum” or an “amendment” to the contract. Essentially, this addendum or amendment is another contract in which the parties agree on changes to the original document. The addendum or amendment needs to be signed by both parties before it goes into effect.

HOW IS A CONTRACT BETWEEN PARTIES FROM DIFFERENT COUNTRIES ENFORCED?

A contract can generally be enforced through litigation in the jurisdiction/venue in which the parties have agreed disputes will be resolved. If the parties to a contract have selected arbitration as a means through which disputes will be settled, then a contract can be enforced through arbitration, but only if the U.S. and the foreign country where enforcement must be obtained, and in some cases also the foreign country where the arbitral

proceedings were carried out, are signatories to an applicable international convention on enforcement of foreign arbitral awards. You should carefully consider (and consult with the Law Department) regarding whether arbitration or litigation is the appropriate dispute resolution mechanism under a contract and how an arbitration or litigation provision should be structured. A poorly drafted dispute resolution provision, whether it provides for litigation or arbitration, can result in ambiguity, confusion and significant costs to [COMPANY].

HOW CAN THE LAW DEPARTMENT HELP YOU?

The Law Department can explain the basics of contract law to you, help you draft a contract, or figure out how to solve a problem that has arisen during the contract's term. To help you the most, you should let the attorney know early on what your needs are and the particular issues you are dealing with. If you think there might be a problem, the earlier you let the Law Department know, the better. To make sure the attorney has a full understanding of the issue, you should keep notes about any conversations you've had with the other party to the contract, any correspondence or documents that you've exchanged up to that point, and records of any events that occurred before the problem arose.