

Contracts, Generally

A contract is an agreement between two or parties which is enforceable by law. To properly form a contract there must be “mutual assent,” often referred to as a “meeting of the minds.” To get such “mutual assent,” there must be an offer, acceptance, and exchange of consideration. Consideration is essentially anything of value, e.g., money, goods, the promise to do something, the promise to refrain from doing something, etc. It is important to note that the exchange of consideration does not have to be balanced to be legally binding. Additionally, all parties must be able to enter the contract, such as having signature authority from their organization. Finally, the subject matter of the contract must be allowable at law.

Best Practices

- The most important practice with regard to contracts is **reading and understanding the contract**. If you do not understand how a term or clause operates, contact the Legal Affairs for assistance.
- A contract does not have to be written to be enforceable, unless required to be in writing at law. Nonetheless it is recommended that contracts at UD be written for the purposes of accurately recording the “meeting of the minds.”
- The first part of contract formation is a relationship with another party with whom goods, promises, or services are to be exchanged. Some amount of mutual trust is required. Even the best contract can be manipulated by an unscrupulous party. Do not think an “ironclad” contract will save a bad relationship.
- Summarize what each party wants to get out of the deal, and what each party’s obligations will be. Ensure after negotiation every obligation and responsibility appears in the contract. Be wary of any party that refuses to put a negotiated term in the contract.
- Define key terms, especially what deliverables each party has as requirements.
- Take special care to ensure that payment terms are very clear as to amount, date, and contingencies, if any.
- Contact Legal Affairs for assistance with drafting the contract or to review the other party’s template.
- Ensure there are mechanisms in place to monitor the other party’s performance and UD’s compliance with obligations of the contract.
- The contract must be signed by someone at UD who has the proper signature authority.

Clauses to Include

- Choice of law and choice of venue should be Ohio law and Ohio courts, respectively.
- Most contracts benefit from a confidentiality clause unless the parties specifically want the contract to be public.

- Treatment of intellectual property rights, if applicable.
- Modifications of the contracts must be in writing, and signed by both parties.
- “Integration” clauses that specify that the contract represents the parties entire agreement on the subject and supersedes all previous agreements on the matter.
- “Severability” clauses, where if one provision is struck down the rest of contract survives.
- Similarly, “waiver” provisions where the waiver of one part of the agreement does not constitute waiver of the entire agreement.
- Clear termination circumstances and clear rights of termination.
- Start and end dates.

Important Considerations

Contracts come in all shapes and sizes. They do not have to be labeled as a contract to be a contract. Contracts can be formal documents with lots of “whereas” clauses, memoranda of understanding, letter agreements, “clickwrap” or “clickthrough” agreements, or anything that requires and exchange of consideration.

- Legal Affairs is always here to help with contract matters, but please ensure plenty of advance notice!
- Ensure that the contract has a defined duration, and you are prepared to meet your obligations during that term. Shorter terms are less risky, so it can be beneficial at the start of a relationship to try a shorter term, such as 1-2 years. Avoid “evergreen” clauses that require automatic renewals absent notice by the other party and unilateral renewals.
- Beware of contracts that require exclusivity, such as the requirement that the University only use the products or services of a single vendor. When possible leave other options open.
- Certain types of “high risk” contracts should be reviewed by Legal Affairs. These include, but are not limited to, agreements with international parties, work with minors, agreements concerning chemicals, explosives, or radioactive materials, and contracts with the government.
- Avoid unlimited assignments rights or the transfer of intellectual property.
- Some clauses ~ such as indemnification, warranty and liability clauses ~ impose great liability on UD. If you do not understand what risk clauses such as these impose, please contact Legal Affairs for guidance.
- Beware of the definitions section. It can turn an otherwise innocuous clause into an onerous clause.

Contract Basics, cont'd

- If you have any questions, or would like assistance with any part of the contract process, please contact anyone in Legal Affairs. We are here to help you accomplish your goals.
- But note that typically the “business terms” of the contract are up to the unit undertaking the contract. That is, whether it’s a “good deal” is not something Legal Affairs is typically in a position to know. However, Legal Affairs can assist with ways to structure the deal, ways to create leverage or incentives, etc.