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TOP 10 CONTRACT DRAFTING MISTAKES

By Tricia Davis, Esquire

Generally, in order for a contract to be enforceable, the nature and extent of the parties' obligations must be certain. It is essential that there be a meeting of the minds on all material terms and the subject matter of the contract. If a contract is incomplete, indefinite, incapable of being performed, or lacking consideration, then a court may rule that the contract did not exist at all.

Many times when non-attorneys draft contracts, enforceability and interpretation issues arise. A court may hold that a provision of a contract is ambiguous if it is reasonably or fairly susceptible to different interpretations. If a contract drafted by a layperson is ambiguous, a court may give greater latitude in construing such a contract to carry out the intent of the parties. However, whether drafted by a layperson or an attorney, an ambiguity in the construction of the contract will always be construed against the party who drafted the contract.

Below is a list of some of the most common drafting mistakes that business owners typically make when drafting a commercial contract for services:

1. Failing to accurately identify the parties to the contract. The contract should identify the parties as completely as possible. In the case of corporations or other business entities, it is important to verify the capacity of the contracting party to bind the corporation to the contract.
2. Omitting covenants and conditions of performance. The contract should clearly state whether each contractual obligation is absolute or conditional with the occurrence of some event. Also, the contract should specify the standard for determining satisfactory performance of an obligation.
3. Failing to adequately define how or when the contract terminates. A contract should specify the length of time of the contract – either terminating on a stated expiration date or on completion of performance. Many times, litigation may be avoided if the parties are clear about the specific grounds for termination and the damages for early termination.
4. Failing to adequately state the method for resolving disputes. This is particularly a problem when the drafter includes a vague arbitration clause or an arbitration provision that is contradicted by reference to a court having jurisdiction over any disputes. Other issues arise with the arbitration clause if it is drafted too narrowly; thereby, excluding certain types of disputes from arbitration. Other essential elements that are sometimes absent from arbitration provisions include the location of arbitration, the governing law, or which party pays for arbitration. Also, it is important to specify the type of notice necessary to invoke arbitration.

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5. Failing to adequately define which rights and obligations under the contract are assignable. If you include an assignment clause, you should state whether consent of the non-assigning party is required or whether there is a fee for the ability to assign the contract.
6. Failing to specify which party pays the attorneys' fees in the event of a contract dispute. Unless there is a provision in the contract stating that a party is entitled to attorneys' fees or a specific statute provides for attorneys' fees, a court cannot award attorney fees.
7. Failing to include a choice of law clause. Conflicts of law issues usually arise when the parties are residents of different jurisdictions, or when obligations are to be performed in more than one jurisdiction. This often-litigated issue can be resolved in advance with the proper choice of law provision. Without a choice of law clause, then generally the law of the place where the contract was made will apply.
8. Including invalid penalty clauses for breach. Penalty clauses are not enforceable. However, if the parties to the contract want to stipulate in advance as to what the damages will be for a breach of the contract, then the parties can include a liquidated damages clause, as opposed to a penalty clause. A valid liquidated damages clause, to be enforceable, must state a reasonable amount of damages under the circumstances. If the damages are excessive, then a court will likely consider it to be punitive rather than compensatory.
9. Lacking of consideration. In order for the agreement to be enforceable, there must be valid consideration – either by an act, or forbearance or a return promise which is negotiated for and given in exchange for that promise. It is a well-settled principle of contract law that a promise unsupported by consideration is unenforceable.
10. Failing to include a contract effective date. It is important to make certain that the contract states when the contract is effective for purposes of determining obligations and the time for performance.

Contract drafting is both an art and a science. Without the proper knowledge of the current law applicable to your industry, business owners run the risk that their contracts will not be enforced in the manner intended. As philosopher and English lawyer Francis Bacon once said, "Knowledge is power."



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