

2016 BRINGING ADMINISTRATORS TOGETHER CONFERENCE

Legal Aspects of Contracting

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10:15 – 11:15 AM

UIC UNIVERSITY OF ILLINOIS
AT CHICAGO

UIC

Lincoln Hall

707 South Morgan Street

Workshop Presenters

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Please ...

- Turn off cell phones.
- Avoid side conversations.
- Feel free to ask questions throughout. There will also be time at the end for questions.
- Sign the attendance roster.
- Complete the evaluation at the end of the workshop.

This workshop has two objectives:

- 1. Identify key legal issues that impact contracts generally**
- 2. Review key legal issues unique to healthcare related agreements**

KEY CONSIDERATIONS EARLY IN THE PROCESS

Any agreement with an outside party can carry significant obligations and responsibilities for the University and its employees.

- Agreements have various names: *Memorandum of Agreement (MOA)*, *Memorandum of Understanding (MOU)*, *Intergovernmental Agreement (IGA)*, *contract*, *agreement*, *affiliation*, “*terms and conditions*,” etc.
- For an agreement to be binding on the University, “**The Board of Trustees of the University of Illinois**” is the contracting party and the **Comptroller** of the University is the signatory.
- Be aware that contracts that are not properly signed can potentially expose the signer to personal liability.

When you start the contracting process, there are three preliminary questions to answer.

1. Can you use a template agreement that has been pre-approved by the Office of University Counsel?

(Check here first: <https://www.obfs.uillinois.edu/forms/contracts/>)

2. Does the contract require approval by the Board of Trustees before it can be signed?

- For example, contracts that require expenditures in excess of \$1 million require approval of the Board.

(Check here first: <https://www.obfs.uillinois.edu/bfpp/section-1-business-financial-administration/section-1-10>)

3. Are there any University- or State-prohibited conflicts of interest?

- For example, the University may generally not enter into contracts with employees or companies owned by employees or their family members.

(Check here first: http://research.uillinois.edu/coci/coci-policy#conflict_of_interest and <https://www.obfs.uillinois.edu/bfpp/section-1-business-financial-administration/section-1-10>)

For procurement contracts, State Law requires vendors to provide certifications and disclosures.

- This can sometimes be an impediment to formation and execution of a contract – particularly with out-of-state vendors.
- Make vendors aware of the certifications and disclosures requirement early in the process.

If the outside party will require use of its own form, keep an eye out for challenging terms.

- Does the outside party wish to **limit its liability** to the University?
- Does the outside party want the University to “**indemnify**” or “**defend**” or “**hold harmless**”?
- Does the contract contain “**non-compete**” or “**non-solicitation**” clauses?

The affected unit is responsible for any costs incurred to resolve contract disputes.

- The University's Self Insurance Plan does not cover contract disputes or damages.
- Attorney fees for outside counsel hired by the University, court expenses, and any other costs incurred will need to be paid ***by the affected unit.***
- The Illinois Court of Claims does not have a limitation on monetary damages for contract disputes. (There is a limitation for non-contract/tort claims).

Carefully consider issues that relate to wind-up and termination of the contract.

- Make sure there are appropriate clauses that deal with things such as the return of vendor or University data, equipment, and material.
- Also consider ownership and unfettered ability of the University to use “work product” produced under the contract.

CONFIDENTIALITY & PRIVACY

Be aware of the confidentiality and privacy concerns related to University contracting.

- Subject to certain limited exceptions, contracts and related documents are subject to the **Illinois Freedom of Information Act**.
- Sometimes a “**Non-Disclosure Agreement**” may be needed as a condition to contract negotiations. A template form approved by the Office of University Counsel is available and preferred.
- Special rules and considerations will apply if a contract involves access to or use of sensitive data such as student information (**FERPA**) or health information (**HIPAA**).

CONTRACT DO's AND DON'Ts

Abide by these Contract “Do’s.”

- **Do** provide Business Office and Legal with *all* parts of the contract (including exhibits, schedules, addenda, riders, etc.) *well in advance of the anticipated start date of performance under the contract.*
- **Do** use capitalized and defined terms consistently throughout the document.
- **Do** confirm the legal identity of the vendor (*e.g.*, XYZ Corp., an Illinois corporation).

And heed these Contract “Don’ts.”

- **Don’t** let section headings stop you from reading the actual text of the whole section (*e.g.*, “indemnity” may *favor* us).
- **Don’t** execute a contract which incorporates or references other documents—including links to terms and conditions posted on vendor websites—without reviewing and/or attaching all referenced documents.
- **Don’t** agree to a modification of a contract without putting it in writing and submitting it to Business Office and Legal.

TERM, TERMINATION, AND EULAs

As a state entity, Illinois law places limits on the term of our procurement contracts.

- Term may be any length up to 10 years.
- Terms may be renewed, but auto renewals are not permitted.
- Maximum term, *including all renewals*, cannot exceed **10 years**.

There are 4 basic types of Termination:

1. Term runs its course
2. Force Majeure
3. Material breach
4. Convenience

End User License Agreements (EULAs) are subject to the same rules as other University agreements.

- What are they?

EULAs, Shrink Wrap Agreements, Click-Through Agreements, etc.

- Who should execute them?

Probably not you

- What should I do if I come across one?

Run!

Choice Provisions

GEOGRAPHY MATTERS

A forum selection clause provides *where* a suit arising from the contract must be filed.

- Be aware, improper forum selection or venue can result in the waiver of important legal protections to the University.
- If using a form provided by the other party, their forum selection clause (a.k.a. **jurisdictional clause**) may specify an undesirable forum, such as a state's circuit courts or federal district court.
- A contract may further include a **choice of venue clause**, which specifies a court within the selected jurisdiction (*e.g.*, Southern District of New York).

University contracts should select the Illinois Court of Claims as the forum.

- As a state entity, the University is afforded sovereign immunity that protects it from being sued in certain jurisdictions.
- Selecting the Illinois Court of Claims as the forum preserves the University's sovereign immunity. Agreeing to another forum or venue waives these very important protections.
- A forum selection clause also provides certainty, can make it cheaper to litigate if the forum is close to home, and can make parties less inclined to file a lawsuit.

Best Practices: *“All claims against the University must be filed in accordance with the Illinois Court of Claims Act.”*

The choice of law clause in University contracts should specify Illinois law.

- A **choice of law clause** designates *whose* law will be applied to interpret the contract (*e.g.*, Illinois, Ohio, federal).
- It is important to choose Illinois law because each state has its own body of contract law and can differ on how to interpret key contract provisions such as indemnity clauses.

Best Practices: *“This Agreement shall be governed (or interpreted) by application of the laws of the State of Illinois, excluding its conflict of law provisions.”*

INDEMNITY

An indemnity clause (a.k.a. hold harmless) allocates legal risks and liabilities between contract parties.

***A* and *B*
contract; *A*
agrees to
indemnify *B***

***A* or *B*
injures *C* in
performing
the contract**

***C* sues *B* for
damages**

***A* pays *B* for
all liabilities
from *C*'s
lawsuit**

The University will not agree to indemnify the other party to a contract.

- Be sure to read any indemnity language carefully as it might *favor* the University—the University will not indemnify the other party, but will gladly let the other party to indemnify it.
- To understand why the University does not agree to indemnity obligations, consider the scenario on the next slide:

Best Practices: Delete any indemnity language that imposes an indemnity obligation *on the University*.

Chef works at Apolobampo



Apolobampo contracted to buy Byocera-brand ceramic knives



A Byocera knife shattered in Chef's hand while slicing ghost peppers causing serious injury



Chef sues Byocera for damages



Byocera's lawyer sees Apolobampo agreed to indemnify Byocera for liability arising from the contract



Apolobampo must pay Byocera for all the liabilities arising from Chef's lawsuit



LIABILITY

There are several categories of monetary damages that a court may award.

- **Direct damages** (a.k.a. compensatory, actual, or expectation damages) represent the amount of money that will put the injured party where it would be if the contract had been performed as intended. They also include foreseeable expenses incurred as a direct result of the breach.
- **Indirect damages** (a.k.a. consequential or special damages) represent losses indirectly caused by the breach, such as out-of-pocket expenses incurred to prevent further loss after the breach.
- **Punitive damages**, uncommon in contract cases, penalize breaching party for intentional, deliberate, and willful conduct, such as fraud.

Parties will often seek to cap their liability for damages through a limitation of liability clause.

Typical limitation of liability provisions:

Nor shall Vendor have any liability for any incidental, consequential, indirect or special damages of any kind, including but not limited to damages for loss of revenue, loss of data, loss of business or business opportunity or other financial loss arising out of or in connection with the sale, installation, service, performance, failure, use or interrupted use of its products, or the unauthorized use of the products.

To the extent permitted by law, the total, cumulative liability of each party arising out of or related to this agreement or the products or services provided hereunder whether based on contract, tort (including negligence) or any other legal or equitable theory, shall be limited to two (2) times the total amounts paid by customer during the twelve (12) month period preceding the first event giving rise to liability. The existence of more than one claim shall not enlarge this limit. The foregoing limitation of liability shall not apply to: (1) customer's obligation to pay for products, services or taxes; (2) a party's obligation in section __ (indemnification); and (3) infringement by a party of the other party's intellectual property rights.

The University is generally inflexible when the other party seeks to limit or waive *direct damages*.

- University does not allow an exclusion or waiver of *direct* damages.
- Try to delete limitations or caps on Vendor's *direct* damages.
 - If that is not possible, at minimum the limitation should be the contract price over one year. Do not limit it to the product or service giving rise to the claim.
 - If necessary, agree to the cap but add an exception carving out areas needing special protection (*e.g.*, breach of confidentiality provisions, breach of licensing provisions in an SLA).

The University has some flexibility when the other party seeks to limit or waive *indirect damages*.

- *Indirect* damages may be excluded or waived *if* the provision is made mutual.
- Carve-outs from an exclusion of *indirect* damages (*e.g.*, confidentiality) pose a difficult issue.
- Note that under Illinois law, the default provides for contribution from joint tortfeasors.

HEALTHCARE-RELATED ISSUES

Contracts related to healthcare have an additional layer of issues to consider.

- The Health Insurance Portability and Accountability Act (HIPAA) creates concerns regarding Protected Health Information (PHI) and Business Associate Agreements (BAA).
- Anti-Kickback Statute
- Safe Harbors: Discount; Personal Services; Rental of space

Resources

- www.legal.uillinois.edu
- www.obfs.uillinois.edu

Questions / Concerns?