



13 STANDARD PROVISIONS TO INCLUDE IN YOUR CONTRACTS

Provided as an educational service by Alan J. Thayer, Jr.

Our special report *How to Write Your Own Contracts* discusses basic contract law principles and offers suggestions for negotiating and drafting general contracts.

This report discusses standard provisions or “boilerplate” clauses you can use in your contracts. Sample boilerplate language is provided with comments on the use of each provision.

You must carefully weigh the use of each clause. Serious losses can result if you carelessly add a boilerplate provision that inadvertently changes your agreement.

Caution: *You should seek legal counsel on all contracts that you consider to be large, complicated or important to your business. You may also want to employ a lawyer to draft forms for contracts you frequently make, such as purchase orders, sales documents, employment contracts, etc.*

Assignments

This Agreement shall not be assigned by any party and the performance of the duties under this Agreement shall not be delegated to any party without the written consent of all the parties. This Agreement shall not be assignable by operation of law.

Generally, absent a provision to the contrary, the people with whom you contract can transfer their interests under the contracts to third parties without your consent. It is wise to spell out whether the parties to your contracts can assign their interest in the agreement. The provision above prevents all parties from assigning their interest and delegating their duties under the agreement.

You would not want to use this clause, of course, when you wish to retain the right to assign the contract to a third party.

Time of the Essence

Time is of the essence of this Agreement.

The law distinguishes between material and nonmaterial breaches of contract. Remedies are available for material breaches that are not available when the breach is nonmaterial.

A “Time of the Essence” provision can convert a failure to perform in a timely manner that would otherwise be a nonmaterial breach into a material breach at the time of nonperformance. You should use such a clause, however, only in those situations where you are confident you can perform your obligations within the deadlines set out in the contract or where most

of the actions which must be taken in a timely manner are to be performed by the other party.

Future Assurances

Each of the parties shall, upon request of any other party, execute and deliver such additional documents as may be necessary or convenient for the purpose of evidencing or perfecting any rights or interests arising under this Agreement.

Frequently, contracts are signed when it will be necessary to execute additional documents in the future. The “Future Assurances” provision obligates the parties to sign these additional documents.

Alan Thayer is an Oregon business attorney with over 20 years experience representing businesses huge and small. He welcomes your questions and comments. Call 541-345-2325 or email Alan at athayer@ptlaw.com.



Notices

Any notices required or permitted to be given under the terms of this Agreement, or by law, shall be in writing and may be given by

personal delivery or certified mail, directed to the parties at the following addresses, or such other address as any party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law:

(Insert the name & address for each party to the agreement)

Any notice given shall be effective when actually received or if given by certified mail, then forty-eight (48) hours after the deposit of the notice in the United States mail with postage prepaid.

When a party to a contract fails to perform as promised, it is appropriate to send notice of the nonperformance to the party as soon as possible. Notices should describe the nonperformance and set out a definite time period for correcting the promise. You should include a notice clause in your written contracts so that there can be no dispute as to how notices should be transmitted.

Modification

Neither this Agreement nor any term or provision of this Agreement may be changed, waived, discharged, amended, modified or terminated in any manner other than by a written instrument signed by all the parties.

Disputes over contracts frequently include claims by one party that there has been an oral modification of the written agreement. The court must then determine if there has been a modification as claimed and whether that modification was supported by additional consideration. You can avoid inadvertent modifications to your written agreements by providing that any changes must also be in writing.

Adding the modification provision is the first step. You must also insist that the provision be

followed in all of your dealings. Otherwise, courts can rule that the parties waived the provision by their conduct and allow claims of oral modification.

Waiver

No waiver of any right arising out of a breach of any covenant, term or condition of this Agreement shall be a waiver of any right arising out of any other or subsequent breach of the same or any other covenant, term or condition or a waiver of the covenant, term or condition itself.

Waiver is a legal principle similar to the familiar phrase, “if you don’t use it, you lose it.” If you do not object to a party’s failure to strictly comply with a particular provision in your agreement, then they can argue you waived the right to require strict compliance in the future. For example, if you do not object when a party makes a late payment to you, they could argue that you have waived the right to require payment by the agreed upon due date in the future. A waiver provision can help protect you from inadvertently waiving some of the rights or remedies you may have under a contract.

Entire Agreement

This Agreement constitutes a final and complete statement of the agreement between the parties and fully supersedes all prior agreements or negotiations, written or oral.

This provision helps protect you from a party later claiming your contract included terms or side agreements that were not included in the written agreement. This provision is only appropriate, however, when you are certain that all of the terms of your contract have been included in the written agreement. If there are other written agreements or oral understandings that relate to the subject matter of the contract, then

you should refer to those other agreements in your contract and make appropriate modifications to this provision.

Attorney Fees

In case any action or legal proceeding is commenced to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to recover in the proceeding, or any appeal, a reasonable attorney fee to be set by the court, including a reasonable sum for post-judgment collection, in addition to the costs and disbursements allowed by law.

In most court actions, each party must pay their own attorney fees unless there is a statute or a contractual agreement that provides otherwise. If you want the right to recover your attorney fees in any litigation relating to your agreement, you must specifically provide for that right.

The advantages of including an attorney fee provision are two-fold. First, in the event another party breaches the agreement, your damages can include the amount of your attorney fees. Second, it increases the financial risk to the other party if they take an unreasonable position in disputes. A practical result is that the threat of liability for attorney fees can often help resolve disputes by negotiation.

You should not use an attorney fee clause if you believe you may be in breach of the contract.

Limitation of Actions

No action, whether in contract or tort, including negligence, arising out of the performance of any party under this Agreement may be brought by any other party more than eighteen (18) months after the cause of action arises, except that an action for nonpayment may be brought within eighteen (18) months of the date of the last payment under this Agreement.

Most states have a six year Statute of Limitations or longer for contract actions. This is the time in which a lawsuit may be brought.

You may wish to limit the time period in which actions relating to your contracts may be brought by agreement. Before using this clause, you should carefully consider whether you will benefit by limiting the time for bring actions.

Applicable Law

The applicable law for the purpose of interpreting or enforcing any rights or obligations under this Agreement shall be the laws of the State of Oregon.

When parties to a contract are located in different states, it can be a complicated question determining which state's laws control the agreement. When drafting a contract, however, you can agree in advance which state's laws are to be used for interpreting and enforcing the agreement. You want to use the laws of the state of your primary location or where your home office is located

Partial Invalidity

If any provision of this Agreement is held to be invalid or unenforceable, a valid and enforceable provision as similar as possible to the terms of the provision held to be invalid or unenforceable shall be added and all other provisions shall nevertheless continue in full force and effect.

When a particular provision of a contract might be unenforceable, you may want to consider a "Partial Invalidity" provision. Covenants not to compete are one form of contracts where Partial Invalidity provisions are particularly helpful. When a particular term of an agreement may be unenforceable, a Partial Invalidity provision prevents the entire agreement from being held to be invalid.

Counterparts

This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, and all such counterparts shall constitute one and the same document. This Agreement shall be effective when each of the parties

has executed one or more counterparts, and each has delivered an executed counterpart to one of the other parties.

If there are a number of parties to an agreement, it can be difficult to get the parties together for signing, particularly when documents are to be signed on short notice. A "Counterparts" clause can be included to simplify the signing process.

Captions

The Table of Contents and the captions are inserted only for convenience and are not part of this Agreement nor a limitation on the scope of the particular paragraph to which each refers.

Paragraph headings and tables of contents can make contracts easier to read. They can also make it easier to refer to particular provisions. When using paragraph headings and tables of contents, you should make clear that they are only for convenience and are not to be used for interpreting the contract.