



Small Business Wise...

Almost every business uses some type of preprinted, form contract for routine customer or supplier transactions. Most purchase orders, service agreements and leases are form contracts. They can provide legal protection without the expense of having a lawyer prepare a new contract for each and every transaction. However, a poorly written form contract invites customer or vendor disputes and exposes your business to lawsuits. You can minimize disputes and reduce litigation costs by having an attorney review your form contracts to ensure they are drafted correctly and contain appropriate legal terms.

The first step in creating and maintaining a good form contract requires you to determine if any terms are mandated by state or federal law. For example, in New Jersey, home improvement contracts must indicate the dates when work will commence and be completed. If the contract fails to include this information and a dispute ensues, the contractor may lose the right to receive payment for its services. Additional examples include health club service contracts and retail contracts involving the sale of furniture. New Jersey requires these contracts to apprise customers of their right to cancel the contracts under certain circumstances. Health club operators and furniture retailers that fail to comply with these requirements are subject to penalties under New Jersey's Consumer Fraud Act. Accordingly, it is essential that you determine whether the law imposes any specific requirements for contracts in your industry when preparing your form contracts.

Furthermore, contracts can "wear out" like anything else. Frequent changes in the law make it imperative that you review and update your form contracts regularly.

Next, you must ensure that your form contract contains the basic terms necessary to describe the transaction. At a minimum, a properly prepared form contract will allow you to clearly identify the specific customer and the goods or services to be provided, as well as indicate the time and place for delivering the goods or rendering the service. If you fail to adequately describe these basic terms, you can be

FORM CONTRACTS: REVISING THEM NOW CAN SAVE YOU MONEY LATER

By Christopher Massaro, Esq. and
Andrew Fisher, Esq.

assured that misunderstandings will develop with your customers, which will lead to a loss of goodwill and, perhaps, even expensive litigation.

In addition to these basic terms, you may wish to consider including terms such as a limited warranty on goods or services or a disclaimer of all warranties to the fullest extent permitted by law. You might also insert a clause limiting a purchaser's remedies if a product you have sold fails. For example, you could specify that you will repair a defective product during the warranty period, but will have no obligation to replace the product with a new one. You could also limit a customer's right to cancel the contract. Courts will generally enforce warranty disclaimers and limitations clauses if they are reasonable, conspicuous and their language comports with certain technical legal requirements.

Merger and modification clauses are useful in preventing customers from claiming they were promised items or services not identified in the written form contract. Merger clauses demonstrate that the parties intended the written contract to override any prior negotiations or discussions, and modification clauses require any changes to the terms of the contract to be in writing. Used together, they make it difficult for a customer to claim that more was promised than what is expressed in the written contract.

With some restrictions, you can also add clauses requiring lawsuits to be brought only in the state where you do business, and can specify that the controversy must be resolved according to your state's laws. This will prevent you from having to travel out-of-state to defend

against lawsuits, and ensures that a court will apply the familiar laws of your state to resolve the disagreement. You may even prefer that an arbitrator decide all disputes arising under the contract rather than a judge or jury, and it is permissible to incorporate this preference into your contract.

The final step in creating and maintaining a good form contract involves making sure that it is well organized and drafted in plain language. The terms of the contract should be broken into discrete sections with descriptive headings placed directly above each section. For example, an arbitration clause should appear directly under a heading entitled "Arbitration," and no other terms should be included under this heading. Relatively important terms should appear in capital letters or boldface, and all of the language in the contract should be written in an easy to understand manner with as little "legalese" as possible.

It would be impossible to address each and every term that your contract should – or could – include in this short article, or provide all the details necessary for preparing a good contract. The key to ensuring that your rights and interests are fully protected is having your form contracts drafted, reviewed and maintained by a qualified attorney. Remember, a good form contract will not only protect you in the event of a lawsuit, but will also protect your business relationships by preventing disputes from arising in the first place.

Christopher Massaro is a litigation attorney in the Hackensack office of Cole, Schotz, Meisel, Forman & Leonard, P.A. and Andrew Fisher is a corporate attorney with the firm. Mr. Massaro can be reached at (201) 525-6272, or cmassaro@coleschotz.com, and Mr. Fisher can be reached at (201) 525-6321, or afisher@coleschotz.com.