

**Yes, No, or Maybe:
Negotiating University
Contracts**

February 15, 2017

Sarah O. Edwards
Associate General Counsel

Getting Started

Which of the following would not be considered a contract?

- A. Affiliation agreement
- B. Memorandum of understanding (MOU)
- C. Letter of agreement
- D. Online terms of use
- E. Purchase order
- F. None of the above; they're all contracts!

Option	Percentage
A.	17%
B.	17%
C.	17%
D.	17%
E.	17%
F.	17%

University Policy 603.1

- ▶ A Contract is any document that legally binds the University to another party, including any agreement in which either party promises to take specific actions or to refrain from taking certain actions.
- ▶ A Contract might or might not involve the payment of money.
- ▶ Online terms and conditions that must be accepted prior to using a product or service are also considered Contracts under this Policy.

Your Best Friends . . .

- (1) The Contract Checklist:
legal.uncc.edu/legal-topics/contracts/contract-checklist
- (2) Guidelines for Accepting Digital or Electronic Signatures:
legal.uncc.edu/legal-topics/contracts/guidelines-accepting-digital-or-electronic-signatures
- (3) What to Consider Before Signing a Contract:
legal.uncc.edu/legal-topics/contracts/what-consider-signing-contract
- (4) Signature Authority Chart:
legal.uncc.edu/sites/legal.uncc.edu/files/media/SignatureAuthorityChart.pdf
- (5) Your friendly neighborhood attorney:
sarah.edwards@uncc.edu

Finding Your Bearings



- ▶ What product or service is being provided here?
- ▶ Does the university need to provide information (student, personnel, financial, etc.) to the other party to make it happen?
- ▶ Will the other party have access to university facilities or IT networks?
- ▶ What could go wrong with this arrangement (if the product or service doesn't work as intended, if the other party discloses our information, if the other party damages our property, etc.)?
- ▶ Are any documents mentioned (attachments, appendices, linked terms and conditions, etc.) that aren't included?



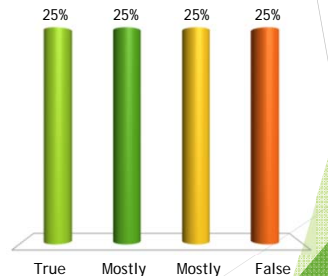
NOPE
(aka deal breakers)

Deal breaker #1: Waiving immunity

- ▶ Sovereign Immunity = the state cannot be sued
- ▶ NC has given up its sovereign immunity only for certain limited claims (G.S. 143-291, et seq.)
 - ▶ only for harm resulting from negligence
 - ▶ only up to \$1,000,000
- ▶ Issues affected by this principle:
 - ▶ indemnification
 - ▶ substantive law/jurisdiction (G.S. 22B-3)
 - ▶ binding arbitration

UNC Charlotte students are not covered by the NC Tort Claims Act.

- A. True
- ✓ B. Mostly true
- C. Mostly false
- D. False



Category	Percentage
True	25%
Mostly true	25%
Mostly false	25%
False	25%

Indemnification

- ▶ Key words –
 - “indemnify”
 - “release”
 - “defend”
 - “hold harmless”
 - “waive”
- ▶ The University can agree to cover:
 - ▶ personal injury and property damage
 - ▶ based on the negligence of our employees (not students!)
 - ▶ up to \$1,000,000
- ▶ Get the Tort Claims Act language in there! (“Only in the manner and to the extent permitted by the North Carolina Tort Claims Act, N.C.G.S. 143-291, *et seq.* and without waiver of its sovereign immunity, . . .”)

Negotiating Substantive Law

- (1) Strong preference = North Carolina law
 - ▶ “This Agreement shall be construed, governed, and enforced by and in accordance with the internal laws of the State of North Carolina without regard to its conflict of laws provisions.”
- (2) Second option is to delete any reference to which law governs (i.e. remain silent)
 - ▶ good if services performed in NC
- (3) Last option (and only if the contract is very important and the other party will not budge after multiple attempts):
 - ▶ “Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may be brought against a party to this Agreement only in the state or federal courts in the state of the defending party, and the law of the situs of the litigation will govern such action or proceeding.”

Other deal breakers

- ▶ No-hire clauses (G.S. 126-14.2(a))
- ▶ Non-competition clauses (G.S. 143, Article 3 (bidding))
- ▶ Attorneys’ fees, court costs, etc. (G.S. 143-291 et seq.)
- ▶ Personal liability (Defense of State Employees Act (G.S. 143-300.3 et seq.))
- ▶ Contract with employee or family member (University Policy 603.2)

Quick fix for no-hire clause

University agrees that during the term of this Agreement, and for a period of two (2) years following the last rendering of services by Company, University shall not directly ~~or indirectly solicit, or be solicited by or employ as a salaried employee or independent contractor,~~ any Company employee that was assigned to University's project or account.



MAYBE
(aka risky clauses)

Risky terms

- ▶ Alters legal protections
 - ▶ statute of limitations
 - ▶ injunctive relief (agree to irreparable harm)
 - ▶ liquidated damages/cancellation fees
 - ▶ waiver of trial by jury (G.S. 22B-10)

- ▶ Limits liability

- ▶ Forfeits control over lawsuits

- ▶ Best efforts/warranty

- ▶ Business Associate Agreements

Quick fix for injunctive relief

University understands and acknowledges that the disclosure of Company's confidential information would may give rise to irreparable injury and, as such, that Company has the right to seek equitable and injunctive relief to prevent the unauthorized disclosure of its confidential information.

More risky terms

- ▶ Use of University name/logo/trademarks in advertising
- ▶ Acceleration clauses
- ▶ Late payment penalties
- ▶ Liens on state property
 - ▶ G.S. 44A-34
- ▶ Confidentiality
 - ▶ G.S. 132-1 et seq.

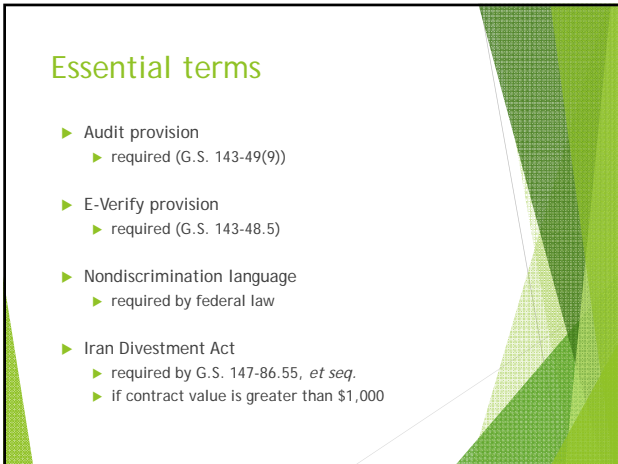
Quick fix for confidentiality

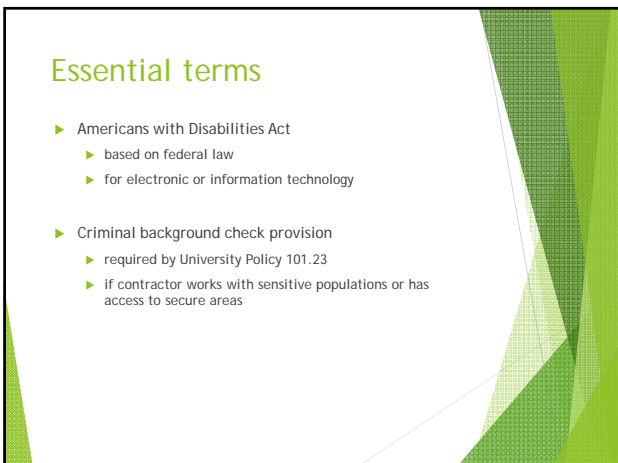
If the contract defines "Confidential Information," simply add a sentence that reads:

"Confidential Information" does not include any information that is required to be disclosed by law, including but not limited to the North Carolina Public Records Act, N.C.G.S. § 132-1, et seq.

- ▶ We can also agree to notify the other party prior to disclosing its information in response to a public records request or subpoena.

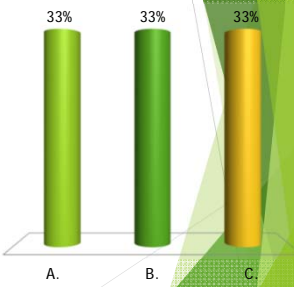







Which of the following situations would require the addition of a CBC provision?

- A. The College of Business purchases a new software program to manage all of its students' information, including grades and class schedules.
- ✓ B. Housing and Residence Life contracts with a construction company to renovate its common area lounges in Scott Hall.
- C. The chancellor's office purchases new chairs and tables for its conference room that will be delivered to Cato Hall.



Situation	Percentage
A.	33%
B.	33%
C.	33%



Other stuff

Additional issues to notice

- ▶ Insurance
 - ▶ minimum insurance requirements from Risk Management
- ▶ Default provisions
 - ▶ remember time to cure
- ▶ Tax issues
 - ▶ Unrelated Business Income Tax (UBIT)?
- ▶ Multi-year terms
- ▶ Warranties/representations

Additional issues to notice

- ▶ Intellectual property rights
 - ▶ patents (Univ. Policy 301)
 - ▶ copyright (Univ. Policy 315)
 - ▶ tax-exempt bonds (e.g. new science building)

- ▶ Publication rights
 - ▶ BOG policy (UNC Policy Manual 500.1)
 - ▶ Export controls (Univ. Policy 316)

- ▶ Personal services/independent contractor status

- ▶ Personal identifiers
 - ▶ G.S. 132-1.10 & 14-113.20(b)
 - ▶ FERPA/HIPAA

FERPA

Scenario: The College of Business purchases a new software program to manage all of its students' information, including grades and class schedules.

Add: Agency acknowledges that for the purposes of this Agreement it will be designated as a school official with legitimate educational interests in the students' education records, and Agency agrees to abide by the limitations and requirements imposed on school officials by Family Educational Rights and Privacy Act and its implementing regulations (FERPA). Agency shall use the education records only for the purpose of fulfilling its duties under this Agreement and shall not share such data with or disclose it to any third party except as provided for in this Agreement, required by law, or authorized in writing by the University.

Data/information

Data sharing (from them to us)

- ▶ University Policy 311.9

Data sharing (from us to them)

- ▶ Does contract involve information that needs to be kept secure (e.g. student info, financial info, personnel info, SSNs, medical info, etc.?)

- ▶ Is the University able to retrieve the information from the company promptly in order to respond to public records requests?

- ▶ Will the company keep the information secure (physical and/or electronic) ?
 - ▶ OLA has one-page Data Protection Agreement template

Fairness/Common Sense

- ▶ Who is paying? How much and by when? (And what is being received in return?)
- ▶ Who can terminate? For what reasons?
- ▶ Are terms bilateral where they need to be?
- ▶ How will it be renewed? Auto-renew?
 - ▶ If we're paying and the commitment is longer than this budget year, we have to add clause re: state appropriations.

Signatures

- ▶ Who signs for the university?
 - ▶ Refer to our [signature authority chart](#)
- ▶ What electronic/digital signatures are acceptable from the other party?
 - ▶ Refer to our [guidance document](#)
 - ▶ In general, pdfs of entire contract are okay; graphic images of signatures and/or typewritten signatures are not okay (unless secure software was used)

Final thoughts

What do I do if I don't understand a clause in a contract?

Option	Percentage
A. Ignore it (It's probably not that important anyway!)	25%
B. Delete it (I don't want to accept something I don't understand)	25%
C. Google it (The almighty Google always knows what to do.)	25%
<input checked="" type="checkbox"/> D. Phone a friend (The Office of Legal Affairs can help!)	25%

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Questions?
