Tune up your contracts

How failure to update forms and contracts can lead to problems

Businesses use a number of legal documents, such as purchase orders, confirmations, invoices, leases and employment contracts, but despite the importance of such documents, the process of generating and updating them is frequently haphazard.

"Disputes often arise out of ambiguous, confusing, conflicting or outdated provisions in forms and standardized contracts," says Michael A. Weinberg, a partner with the business litigation specialty firm Novack and Macey LLP. "Companies spend millions to litigate disputes that could have been avoided had they invested mere thousands in periodic reviews and updates of their core contractual documents. Quality forms and standardized agreements can be as important to success as physical, human and financial assets, yet they often go unreviewed and unrevised for decades. Such complacency and inattention can lead to disaster when the neglected documents become Exhibit A in a lawsuit."

Smart Business spoke with Weinberg about how companies can make sure their forms and contracts are up to date and maximally enforceable, and what contract provisions might deserve special attention during the review and revision process.

Michael A. Weinberg
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How can a company start reviewing and upgrading its forms and standardized contracts?

The review and drafting process should be a collaboration between management, which knows the business, and corporate counsel, who knows the law. Companies too often think that, without lawyer involvement, they can simply copy forms and contracts that are being used by competitors or cherry-pick provisions from a variety of such documents.

That's a mistake. Borrowed terms may be poorly drafted, out of date, specific to the requirements of a different state, or otherwise unsuitable as templates. Moreover, copying from multiple documents can lead to internal inconsistencies, variations in definitions and other anomalies that may result in confusion.

The goal of the drafting process is more than the generation of up-to-date documents that fulfill your business objectives; it's also to ensure that such documents are clear and comprehensible. When a document is finalized, the non-attorney who participated in its creation should understand every word of it. While technical phrasing may be required in certain circumstances, forms and contracts with confusing 'legalese' are more likely to land a company in court than those expressed in straightforward standard English.

Given the rapid pace at which the law changes, biannual review of forms and contracts is warranted. All such documents should be reviewed concurrently, even though they likely were created at different times by different people using different terms. By putting documents on the same review timetable, their terms can be harmonized and the potential for future problems reduced.

What role should business litigators play in the review process?

Once documents have been drafted or updated, they should be looked at by a commercial litigator who will approach them from a perspective different than that of corporate counsel. The litigator can perform a 'stress test' on the documents, vetting their provisions to see if their language could be exploited by an adversary in a hypothetical dispute situation.

By playing devil's advocate, the litigator can help pinpoint document provisions that need more work, or identify language or clauses that should be added to the documents to strengthen or clarify them.

What kinds of provisions give rise to problems?

There are myriad standardized documents, and within those a plethora of provisions, any of which may present problematic language. Certain provisions, however, may merit extra scrutiny. For example, a contract might provide for consent to jurisdiction in a certain state or court but then fail to include a stipulation that such state or court is the *only* place where suit can be brought.

Integration clauses can also lead to problems. Such clauses provide that the contract represents the entire agreement of the parties and supersedes all other agreements or negotiations. But, in Illinois, such language is likely insufficient to prevent a party from asserting that it entered into the agreement in reliance on an untrue 'outside-the-document' representation. To maximize the prospect that such an assertion will be rejected by a court, a separate 'nonreliance' clause should be included in the contract.

Warranty provisions are likewise tricky. If you want a warranty, use warranty language. Drafters sometimes employ words like 'promise' or 'guarantee' to describe something they really intend to be a warranty, but failure to use the correct technical term can be fatal. Moreover, when drafting warranties that run in favor of the drafting party, attempts to overreach can backfire. Overly broad warranties that go beyond those set forth in the Uniform Commercial Code are sometimes deemed commercially unreasonable and unenforceable, leaving the party seeking warranty protection with fewer rights than narrower language would have afforded it.

Restrictive employment covenants and confidential information protection provisions also give rise to disputes, but good drafting can improve your odds of success. A drafter should avoid attempting to define every type of information as proprietary or confidential, as such breadth of definition, if rejected by a court, can void the provision. Likewise, drafting covenants not to compete that are overly harsh or excessive in duration or geographic scope can leave you without any valid competition restrictions. A reasonable restriction that is enforceable is better than an overbroad restriction that is struck down.

Where terms of form documents are ambiguous, outdated, confusing, incomplete or poorly worded, misunderstandings can arise, relationships can be undermined and litigation can ensue. For this reason, when it comes to scrutinizing documents, every sentence should be viewed as a potential source of trouble. <<

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