

Top Ten Mistakes Businesses Make When Drafting Contracts in 2016

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Business is booming in Dallas. Continued growth from local companies and a steady influx of new businesses are driving up population, wages, and sales.

According to the Dallas Regional Chamber of Commerce, the real gross product in Dallas is growing at a rate of 4.26%. These trends are likely to continue. More growth usually means more deals, and that means more opportunities to improve the contract drafting process. Here are ten things to remember:



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1. Forum/Venue Selection. The biggest mistake businesses make when drafting contracts is not having a binding forum/venue selection clause. Recent developments in the law make this trickier than you might think. A valid forum/venue selection clause might not prevent litigation, but it might make the difference in whether you win or lose.

2. Ambiguity. Avoid ambiguities like the plague. Ambiguity can arise from a lack of proper proofreading or the use of “legalese” that can make contracts less, rather than more, clear. Remember, courts apply an objective test in interpreting contracts, meaning they look at how an “ordinary” person would understand the contract, not what the parties actually “meant.”

3. Devil’s Advocate. Businesses often fail to have a litigation attorney review contracts until it is too late. In the perfect world, everyone does what they should, but we do not live in a perfect world. You need a litigator to identify, anticipate, and protect against risks in your contracts. The bigger the deal, the more important the litigator’s review.

4. Notice & Cure. Contracts frequently fail to require notice and an opportunity to cure (resolve problems) in the event of a breach of contract. These clauses often create a “cooling off” period that is important to avoid litigation while allowing the parties to fix the small stuff.

5. Damage Limitations. Many businesses fail to understand the benefits (and costs) of contractual limitations on recoverable damages. These clauses often benefit one party substantially more than the other, depending on factors such as whether one party is primarily supplying goods or services to the other and the nature or type of damages that are foreseeable. Limiting damages to the amounts exchanged under the contract may seem reasonable to the supplier of component parts but may be a disaster to the purchasing party if the parts are defective and result in returns or a recall.

6. Compliance. Contracts often create new, ongoing obligations. Make sure those obligations are incorporated into standard operating procedures and that someone is charged with the responsibility of complying with those new, ongoing obligations.

7. Attorneys’ Fees. Texas has long been one of the few states where parties could recover attorneys’ fees in the event of a breach of contract. However, those laws have been under assault recently and may not cover your business. If you want to recover your fees, include that language in the contract.

8. Defined Terms. Contracts sometimes fail to define key terms or phrases. While the parties may believe they know what they intended, the lack of important definitions opens the door to costly disputes.

9. Internal Consistency. Internal consistency can get lost during the drafting process. Before signing, it is important to read the contract from start to finish with an eye towards how the various sections interrelate.

10. Take Control. The first draft of an agreement sets the tone and basis for negotiations. It is the document from which changes are proposed. Preparing

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