

## 10 Things Every Small Business Owner Should Know About Contract Law

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The law of contracts has been developing since Adam and Eve made a deal to keep away from the apple tree in exchange for a rent-free stay in the Garden of Eden. Over the years, the rules of how and when contracts can be enforced have become more complicated, but contract law is not quantum physics, and, for most of you, it is probably far easier to grasp these basic rules than it is to figure out how to make your employees always show up on time or how to keep up with all the most recent software. If you can understand the 10 concepts described below, you won't quite be ready to sit for the Bar Exam but you may save yourself some headaches and be able to recognize when you need some professional help to stay out of trouble.

1. There cannot be a binding contract unless the parties actually reach an agreement. The most fundamental requirement of a binding contract is "a meeting of the minds," and unless the parties share a common understanding about the core terms and intend to be bound to those terms, there cannot be an enforceable agreement. Problems arise when the language of a written contract is ambiguous or when the parties have two similar, but slightly different, interpretations of the agreement.
2. An express contract doesn't always have to be in writing. In the right situation an oral contract can be every bit as binding as a written one. The parties have to express their agreement over the core terms, but there is no universal rule that every contract has to be written down to be enforceable.
3. There are circumstances in which a contract is enforceable only if it is in writing and signed by the party against whom it is being enforced. Certain agreements, such as contracts dealing with real estate, or for the sale of goods worth more than \$500, or to answer for another's debt, generally have to be in writing and signed by the party against whom they are being enforced. Also, contracts that cannot be performed in less than a year typically must be in writing.
4. Actions can speak louder than words. Especially in transactions between businesses that have dealt with each other in the past, the conduct of the parties alone can create a contract. If the conduct reasonably demonstrates that the parties had a common understanding, a court can find that a contract exists, even if the parties never expressly stated, orally or in writing, their intention to exchange promises.
5. Contracts have to be mutual, with both sides agreeing to assume some obligation. I had a case once in which a soda machine operator had my client sign an agreement allowing the operator to keep a machine at the client's shop for a period of several years. The document stated that the operator could stock whatever sodas he wanted, and nowhere did the agreement give him a firm

obligation to do anything he didn't want to do. When the vendor stopped stocking my client's favorite soda, some unpleasanties followed. The operator wouldn't agree to take his machine out, and that led to litigation. The judge ultimately ruled that there was no binding contract because only one of the parties had assumed a duty to perform. The lesson: unless both parties take on an obligation, neither is legally bound.

6. Freedom of Contract has its limits. Although parties are, for the most part, allowed to make agreements under any terms upon which they both concur, there is also a fundamental concept that contracts against public policy will not be enforced. Accordingly, a contract to knock off one's spouse, for example, is not enforceable. Similarly, courts and/or legislatures have also deemed unenforceable contracts requiring contractors to give up their lien rights before payment has been received or agreements by which someone preemptively gives up the right to bring a claim based on the negligence of another.
7. What's in the small print does matter. Businesses will sometimes use the same generic purchase order, order acknowledgement or delivery confirmation form for every deal, assuming that the same form works in all circumstances or that the boilerplate, microscopic type does not really matter. The vast majority of states have adopted a series of laws known as the Uniform Commercial Code, which includes a complicated set of rules for determining which terms in the so called "battle of the forms" can be applied to a particular sales transaction. The order of the exchange, subject matter of the terms and even the size and font of the type face can affect which terms will be enforced.
8. Contract law is not always kind to businesses. The law of contract has developed in part to protect one party from being mistreated by a more sophisticated party in a superior bargaining position, but those protections generally do not apply to businesses. The rules regarding when an agreement has to be in writing and signed by the person against whom it is being enforced and the rules pertaining to which terms can be buried in a form and still be enforceable are generally tougher on a business than on an individual consumer. Similarly, the defense that a contract is "unconscionable" (which can allow a party to void a contract that is so unfair as to "shock the conscience") is very difficult for a business to assert successfully.
9. The parties do not need to agree on every term to create a binding contract. The absence of certain terms, such as a delivery schedule or even a price, will not necessarily prevent a court from finding that a binding contract exists. Especially with contracts involving the sale of goods, courts will still find a binding agreement and fill in the gaps with terms deemed to be reasonable.
10. Handshakes are not substitutes for a real agreement. An old adage proclaims that "good fences make good neighbors." As with fences and neighbors, good contracts make for good business relationships. Knowing the boundaries, whether they be physical ones or the terms of a business deal, can avoid conflicts before they start.

*This article is intended to educate the reader in broad terms but cannot be relied upon to provide legal advice in a specific circumstance. The rules set forth are general in nature and significant exceptions are not addressed. Anyone seeking specific advice regarding a particular circumstance should engage a qualified professional.*