

## CONSIGNMENT AGREEMENT FACTORS TO CONSIDER

What is a consignment agreement? A consignment occurs when a party (manufacturer, vendor, etc.) agrees to place its personal property (often machinery) with another party (here with the University) typically for instructional purposes.

An essential element of a consignment agreement is that one party (Consignor) retains ownership of the personal property, but places the property in trust with another party (Consignee) for its use.<sup>1</sup> Furthermore, the Consignor retains the right to reclaim the property. If the Consignor does not retain the right to take possession of the personal property then the transaction is a donation.

The University has developed a sample consignment agreement. It is recommended you use the sample consignment agreement. Often, however, the Consignor has its own agreement. It is okay to use the Consignor's agreement, but it should be reviewed carefully. As you would suspect the agreement often will be more protective of the Consignor than the University.

You should consider the terms of the agreement carefully to ensure the University is able to fulfill its obligations under the agreement. More importantly, you should consider whether the benefit of the consignment outweighs the risks and financial costs of the consignment. If you believe the risks and financial costs are too high, you should talk with the vendor about your concerns and work to modify the troubling terms. The goal is to have an agreement that is mutually beneficial and fair to both parties. Ultimately, if the costs are too high then the best decision may be not to accept the consignment.

Here are some things to look for when reviewing the Consignor's agreement.

**Names of the Parties.** The names of the parties should be present. While the College's name and/or Program's name are often listed, sometimes reference to Ferris State University is omitted. Ferris State University is the legal entity entering into the agreement.

*Ferris State University (hereinafter "FSU"), a constitutional body corporate of the State of Michigan, located at 1201 S. State Street, Big Rapids, Michigan 49307.* You may also include the College name.

**Description and Value of the Property.** The property should be clearly described including its condition (new or used) and its value.

**Delivery of the Consigned Property.** The agreement should indicate who (Consignee or Consignor) is responsible for the delivery (including costs) of the property to the University. Typically, the owner will require the University to pay for the delivery of property. Generally, having the University pay for the delivery of the property is not a problem given the value of the property is often substantial. If the property is equipment, the agreement should clarify who is responsible for its setup.

**Repair and Maintenance.** Typically, the Consignor will require the Consignee to maintain the property and to make necessary repairs to property. Consignor will often require notification

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<sup>1</sup> In a business setting a Consignor may consign personal property for the purpose of selling the property.

when the property needs repair and may require the property be repaired by the Consignee. Again, this is not an issue, it is a factor to consider when determining the benefit of the property to the University.

**Length of the Consignment.** This section is often labeled the Term of the agreement. The agreement should indicate when the consigned item must be returned to the Consignor. If not, then it is a donation. Often this section may say the Consignor has the right to pick up the item (including substituting the item) or that the parties may extend the consignment.

**Removal and Return of Property.** Often the Agreement will require the University to pay for costs of preparing and returning the property to the Consignor. This is not unusual but it is a factor to consider when deciding whether to accept the property.

**Insurance.** Most agreements will require the Consignor and Consignee to carry insurance. The best way to determine who should provide insurance and what insurance is required is to review the form "Coverage Recommendations" which is posted on the Risk Management & Insurance website. The form lists many of the activities and services that require insurance from the vendor.

Any questions about insurance should be directed to the Risk Manager, Mike McKay.

Risk Management and Insurance Link: [Insurance Level Requirements](#)

**Limitation/Exclusion of Liability.** This section along with the indemnification section should be reviewed very carefully. Often the Consignor will limit its potential liability to some amount that is unrelated to the harm that may occur from the use of the property. Or transfer all of liability to the Consignee through the indemnification requirement which may include liability for the negligent design or construction of the property.

The Consignor may not be interested in modifying this language so the Consignee must determine whether the value of the property to the University outweighs the significant potential liability for accepting the property. This may not be an issue if the property poses little or no liability to the University. It is a matter of making the best decision for the University.

Reasonable Risks for Exclusion/Limitation of Liability Provisions:

- University's liability limited to stated retail value of property.
- Accepting liability caused by the University's acts.
- Damage due to normal wear and tear and usage.
- Excluding Consignor from liability for damages caused by the University's repair, modification, or alteration of the property.

Unreasonable Risks for Exclusion/Limitation of Liability Provisions:

- Assuming liability for damages caused by a product or design defect.
- Agreeing to be responsible for "any and all" damages.
- Consignor's total liability limited to an amount lower than the retail value of property.
- Responsibility for Consignor or another parties' bad acts.
- Forfeiting the right to make compensation claims against the Consignor.

**Indemnification.** To indemnify is to pay the claims made against the other party that arises out of the agreement. Often the Consignor requires the Consignee to indemnify the Consignor against any claims made for injury (typically to students or instructors) or to property by using

the property. Often the request for indemnification is very broad (any claims) increasing the potential liability for accepting the consignment.

If at all possible, the University should not agree to indemnify the Consignor. If confronted with indemnification language here are the options available relating to this requirement.

Try to substitute the following language.

*"The parties agree that statutory and common law theories and principles of liability, indemnification, contribution, and equitable restitution shall govern all claims, costs, actions, causes of actions, losses or expenses (including attorney fees) resulting from or caused by the actions or omissions of the parties hereto."*

If the party will not substitute the above language try to limit the indemnification to the acts or omissions of the University and include at the very beginning the words, "to the extent allowed by law."

If compromise is not possible, ask to remove the language.

You should consult with the General Counsel's office if the other party insists on indemnification language other than the recommended options.

**Governing Law and Venue.** Governing law refers to which state's law applies to the agreement. Often the Consignor is from a different state. The University (Consignee) is a constitutionally created institution and does not want to be subject to the laws of another state. If the Consignor lists a state other than Michigan, you should change it to Michigan or if Consignor refuses to change seek to remove the section.

It is the same for venue. Venue refers to where a complaint would be filed related to the agreement. The venue should be Mecosta County and the state of Michigan.

**Signature/ Signature Authority.** The signature block should have the printed name and title of the person who will sign the agreement. In most cases, the person signing the agreement will not be the same person who is the contact for that agreement. University policy requires the consignment agreement to be signed by the Vice President for Administration and Finance.

### **Final Thoughts**

In the end, the goal is to ensure that the consignment occurs while protecting the interest of the University. The goal is to have an agreement that both parties can live with while being fair to both parties.

Please call the General Counsel's office if you have any questions as you are reviewing the agreement. Furthermore, if you prefer, the General Counsel's office will review the agreement.