

1-1-2007

The Importance of Giving Proper Notice

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Recommended Citation

DuBoff, L. D. (2007). The Importance of Giving Proper Notice. *Interface: The Journal of Education, Community and Values* 7(1). Available <http://bcis.pacificu.edu/journal/2007/01/duboff.php>

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The Importance of Giving Proper Notice

Posted on **February 1, 2007** by **Editor**



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A common “boilerplate” provision in most well drafted contracts is the requirement that notice given pursuant to the contract must be given to the person identified and by the method described in the Notices section of the contract — even if the parties already have knowledge of the facts that the notice covers.

In a leading case involving this issue, a bridge company was required to give notice to an electric company whose cables ran across the bridge whenever work was to be performed on the bridge in order to assure that the high tension electric cables were safe to work around. The contract between the parties provided that the notice was to be given in the prescribed way to a specific department in the electric company and that a request to have the electricity turned off had to be made. Despite the fact that the electric company’s offices looked out on the bridge, and despite the fact that most of the electric company employees (including the individual in the position to which notice should be given) watched the bridge company employees prepare the bridge for repainting, the lack of proper notice immunized the electric company from liability when the electricity was not turned off and a bridge worker was seriously injured.

The process of giving notice is quite simple, but, as the above case indicates, problems can and do arise. To begin with, it is important for you to determine whether the signed contract has a Notices provision and if notice must be given on a particular date and through a prescribed method for purposes of extending the contract, terminating it or causing some other important event described in the contract to occur. In these situations, it is essential for you to calendar the relevant dates. It is a good idea to calendar an earlier alert date so that the relevant provision can be reviewed and an appropriate notice prepared.

If the notice is not triggered by an event clearly identified in the contract and, instead, is triggered by an external event, such as the completion of a building in a construction contract or the completion of sales when there is a sell-off conducted pursuant to a contract, then a periodic review should be calendared so that the parties have the opportunity to timely file a proper

notice. It is a good idea for you to keep a memo with any relevant dates clipped to the signed contract.

In addition to reviewing the final signed contract itself, it is important to determine whether there have been any amendments or other relevant documents, such as notices identifying a change of address or change of identity of the person to whom notice should be given. You should always keep any such documents with the contract.

Once all of the relevant documents are reviewed, it is determined that a notice is appropriate, and the timing of the notice is decided, then you must determine the proper method for giving that notice. Typically, the notice will be given on the party's letterhead in order to clearly identify that the notice is being given by that party.

You must use the method of providing notice described in the contract. For example, if the contract requires notice to be given via certified letter/return-receipt-requested or by personal delivery, then a facsimile or email will not satisfy the notice requirement.

Be sure notices go to all required parties. For instance, even though it may not be set forth in the Notices section, most commercial leases require notices to be provided to the holder of the mortgage on the premises. Making this determination is likely to require you to reread the entire contract.

The parties should think through the most effective method by which notice is to be given when the contract is first entered into, and that method should be clearly identified. It is important to bear in mind that email addresses often change, and requiring notice to be given to a specific email address may be problematic later. Similarly, if a specific person at a company is identified as the person to whom notice must be given, then problems may arise when and if that person is no longer affiliated with the party who is to receive the notice. It would, therefore, be sensible to identify the recipient of notice by job position or title rather than by name. If it is important to identify a specific person, then the section should go on to make clear that if that person is unavailable, an effective notice may be given by communicating with that person's replacement or another person serving in a similar capacity.

It is wise to identify the section(s) of the contract with which the notice is complying and, if possible, append a copy of the contract for the recipient's convenience. In this way, a party receiving the notice can quickly refer to the relevant section(s) in order to understand the purpose for which the communication is being made.

Similarly, the recipient of a notice identifying a particular section of an attached agreement should review the document and comply with whatever requirements are being imposed on that party.

If the relevant date is that of receipt rather than that of communication, then care must be taken to provide the notice early enough so that an unplanned delay will not be catastrophic. Here, too,

when drafting a contract, the parties should think through the implications of requiring the triggering date to be the date notice is given or the date notice is to be received, since the difference between these two dates can be significant, unless fax, email or overnight delivery is required.

The standard boilerplate provisions of most well crafted contracts are frequently not given much attention until a problem arises. Unfortunately, these sections, while common, are nevertheless important and, in some situations, may be key to enjoying the benefits of the agreement.

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