

Top Ten Compliance Pitfalls

#10

CONTRACTING—GENERAL

Common Mistakes/Examples:

- Agreeing to really unfavorable terms (i.e. waiver of our indemnity rights, indemnifying other party, waiver of jurisdiction, binding arbitration, paying another side's legal fees as consequence of a dispute, etc.)
- Agreeing to terms contrary to law or University policy (i.e. private settlements, non-competition, agreed to keep contract confidential or company information confidential when contrary to MN Data Practices Act disclosure obligation)
- “Accidental” contracts
 - contracts can be oral, majority do not need to be in writing to be enforceable
 - letters and e-mails can be a “contract”
 - a contract can be made up of a series of letters or e-mails (offer, consideration, acceptance)
 - a statement of your “intent” might be construed to be a contract, even if you intended a gift.
- No authority to enter still may create a contract: Apparent authority can bind the U and result in unfavorable contracts
- Commitments of space/resources/approvals binds other offices
- Starting performance before contract signed
- Not obtaining appropriate documentation from other side (insurance, waivers, etc).
- Artificially separating contracts to avoid competitive bid process
- Agreeing to allow company to use University or its logo in advertising

Risks/Consequences:

- Lose legal rights
- Stuck with long term contract you don't want (e.g. automatic renewals, penalty for non-renewal, other fees).
- Lawsuits; Violation of University Policy

Practice Pointers:

- Use University standard form contracts; if not a standard form or form does not meet your needs, consult with OGC before signing or to seek a change
- Carefully read other party's standard form (and other) contracts and ask questions. The “other side” can change its contracts too.
- Include “This is for discussion only” or “This is not a contract” or similar language on negotiation correspondence
- Work with college to formalize (i.e. delegate) who is authorized to enter into contracts, clarify with staff they don't have authority if they don't
- Consult with University experts as soon as you see a potential problem.
- Before signing any binding document, ask “do I understand what I'm signing” and “do I have authority to sign this.”

#9

AUTHORIZATIONS/CERTIFICATIONS

Common Mistakes/Examples:

- Signing a certification stating you know something to be accurate when you don't know it or have no basis to know it (e.g. many government program forms)
- Signing a certification when you suspect it's not accurate (e.g. approval of REPA disclosure, reimbursement request)
- Approving expenses that are contrary to University policy. (Note: for many cases, such expenses come from sponsored projects, and U policy is designed to reflect federal law).
- Approving a "legal" settlement without OGC approval.
- Allowing "professional services" to begin before contract signed and approvals obtained (need a contract if over \$200 and not honoraria, speaker travel, and other very limited exceptions).

Risks/Consequences:

- Government will hold you to a certification (e.g. basis for famous case against U surgeon on all tax evasion claims based upon travel reimbursement requests)
- Very difficult to explain years later if trouble arrives and all you have is the certification
- Unanticipated chargebacks
- Treated as exemption from policy when not authorized to give that exemption (e.g. only Dean can approve REPA exemption)

Practice Pointers:

- Ask questions if you are asked to certify another's information or disclosure
- Ensure your responsible administrators know and understand University financial policies
- If something looks like a "work around" a University rule, it probably is not permitted, and may be illegal. Take a harder look to satisfy yourself (or have your support do so)
- Let everyone know you will not "rubber stamp" requests, and stick to it.
- Look to see if document may be a settlement by examining whether it has a waiver of claims or rights

#8 EMPLOYMENT: HIRING

Common Mistakes/Examples:

- Not recruiting a diverse applicant pool
- Not following seniority/layoff/job transfer list rights; placing hire in “temp no-post” position where position is really permanent and converting
- “Bad” (i.e. illegal/inappropriate) interview questions (“do you plan to have kids?”)
- Making someone P& A who is not really “exempt” from FLSA
- Misclassifying the person as an “independent contractor” or “grant recipient” or “graduate student” (for credit) when really doing work as employee, or vice versa
- Not checking references, credentials
- Botched employment offers:
 - lack of authority to make the employment offer (position, salary, terms),
 - making a legally binding but unintended employment offer,
 - promising terms contrary to U standard employment contracts,
 - failing to incorporate U standard employment terms & policies,
 - making commitments beyond authority/that bind another person/office or department (i.e. space, funding)
- Not explaining contingencies of offer (i.e. hiring position contingent on successful background check, grant award, etc.)
- Not telling applicants how you plan to use private information you gather, or using that information for any other purpose

Risks/Consequences:

- Violation of U policies/ Lawsuits
- Fail to recruit diverse workforce
- Tax Assessments/Fines (wrongful classification)
- Unintended commitments (position and amounts)

Practice Pointers:

- Use a search committee; Double check on authority to make the offer
- Have written list of questions to ask all applicants during interviews
- ALWAYS ask to check with applicant’s past immediate supervisor. Request copy of two most recent performance reviews if written
- Consult HR Professional early on
- Express contingencies of offer in writing in the letter (“this position is contingent on . . .” funding, approval, etc.)
- Use standard offer letters/language from HR website

#7 EMPLOYMENT:WORK ENVIRONMENT

Common Mistakes/Examples:

- Not spotting or dealing with internal disputes early on (i.e. “silent treatment” is not an effective management tool)
- Failing to accurately track vacation and sick time where required
- Not paying required overtime/compensatory times or amounts when and how required (employees not exempt from FLSA cannot “agree” to waive rights to time and half for overtime, work “off the clock” to finish the job, be required to attend work events without pay, combine weeks to eliminate “overtime” etc.)
- Not establishing a culture that respects differences
- Not stamping out discrimination or harassment immediately (i.e. a few too many “stray remarks” establish a hostile working environment, at least in some people’s eyes)
- Not applying rules to all equally (cannot be a compliance “golden child”)

Risks/Consequences:

- Lose good employee
- Bad morale
- Claims/Lawsuits, etc. (Dept. or unit has \$10,000 deductible for claims)
- Financial loss

Practice Pointers:

- Encourage staff to use University dispute and counseling services (i.e. EAP, Disability Services); work hard in Phase I and Phase II grievance (phase III and lawsuit/IV arbitration are very time consuming)
- Take an active role in staff growth and professional development (i.e. make development goals part of performance review, formalize as part of employee expectations and request annual update)
- Ask EOAA to do an in-service education program
- Send e-mail to department/college reminding them of resources
- Use University training/education programs for professional development and make staff time available to do that

#6 EMPLOYMENT: OVERSIGHT AND DISCIPLINE

Common Mistakes/Examples:

- Mixed messages to problem employees (i.e. satisfactory performance review, but singled out for non-renewal and in protected category)
- Blindsiding employees with discipline (i.e. failure to communicate, too friendly or nice to employees to give honest feedback until a snap event, letting problems silently fester)
- Poor recordkeeping making it difficult (or contrived) to support employment action or violating collective bargaining or privacy rules;
- Failure to identify where progressive discipline rules apply and follow them (easiest way for employee to successfully challenge a decision)
- Impertinent e-mails (i.e. almost every e-mail is subject to discovery, and most don't seem very funny when presented to a neutral by an hostile advocate)
- "Good" recommendation when not true (don't be "nice" to an employee with performance problems by giving a good recommendation, not fair to new employer, especially if another department, sends mixed message, basis to challenge action)

Risks/Consequences:

- Lawsuits/arbitrations are difficult to have challenged and dismissed prior to hearing
- Lose "legitimate business reason" defense
- Bad morale/inefficiency
- Embarrassing records publicized/use against the U

Practice Pointers:

- Have clear, written job description. Have faculty or staff set out annual goals/objectives. Review these in person with faculty or staff.
- Make performance review a formal, regular process. Document it and have employee review and sign off with comments.
- "How" you do discipline/oversight is tremendously important to employees, reduces lawsuits and whistleblower actions. Meet face to face, deliver messages yourself, provide meaningful opportunity for feedback, be consistent and firm.
- Don't give a recommendation if you can't be honest
- Don't facilitate sending a problem employee to another department if inadequate in yours
- Consult with HR resources early and often
- Get written permission prior to giving any recommendation of employee

#5 PRIVACY/INFORMATION SECURITY

Common Mistakes/Examples:

- Using social security numbers on forms (i.e. older UofM forms, Collegiate forms) as identifiers
- Not crossing out personal credit card information on expense reports (they are imaged and available to 1000+ users with PeopleSoft Access)
- Not using firewalls/antivirus/VPNs, etc. You may have no other way of knowing someone has already silently hacked without these
- Putting sensitive private data (i.e. payroll records, SSNs, expense reports with bank information) in trash without shredding or using other safeguard
- Not keeping confidential information you receive confidential (i.e. office gossip, reasons for FMLA leave, e.g. “Sue’s on medical leave because X.”)
- Sloppy handling of protected student data (posting exam results by student id, providing list of students with good GPA to recruiters, disclosing information to parents or others, disclosing information of student with “suppressed” record request)
- Not telling applicants how you plan to use private information you gather, not getting written consent for gathering information (i.e. credit reports) or using that information for any other purpose

Risks/Consequences:

- Violation MN data practices laws (automatic fines and attorneys fees, no good faith defense,) common law privacy, or other state or federal laws
- Personal identity theft (listed by FBI as fastest growing crime in America)
- Unnecessary embarrassment, bad publicity, hurts institutional public image

Practice Pointers:

- Don’t ask for information you don’t need, don’t keep records you don’t need to keep
- Consider “does X really need to know this information” before disclosing something your instinct tells you is private or confidential
- Don’t give passwords out to anyone
- Do inventory of computers/servers and ensure antivirus on all and current
- Inventory collegiate forms to remove SSNs
- Have shred box or controlled trash available
- Invite a U privacy and records expert to a staff meeting or lunch for education and Q & A.

#4 USE OF UNIVERSITY RESOURCES

Common Mistakes/Examples:

- Using U letter head/title to imply U endorsement of private activity
- More than “incidental” private use of U resources. e.g. paper, color copies (i.e. personal digital photos), office supplies, equipment, other materials without compensation.
- Not controlling software license agreements (i.e. private use of software licensed only for University use)
- Failure to secure copyright permissions when not really “fair use” academic work
- Commingling or failure to properly segregate and account for grant/University purchases, and limiting use accordingly.
- Assigning “private” or other non-U work to staff, student workers
- Using U funds for non-permitted entertainment, “unreasonable” recruiting payments, bad example events (alcohol).
- Private use of U long-distance line
- Excessive staff use of private e-mail, internet use during paid worktime
- Giving older computer or “obsolete” office equipment to staff—must go through inventory services

Risks/Consequences:

- Bad publicity (e.g. City of Brooklyn Park audit)
- Aggregate financial cost is staggering. Studies have shown loss from the theft of office supplies and related items is \$60-120 *billion* in US each year.
- Dilutes culture of compliance, and makes more vulnerable to other, perhaps more serious breakdowns

Practice Pointers:

- Set an example (e.g. bring in ream of own paper if doing significant printing)
- Be proactive: at staff meetings and other times set clear, reasonable expectations and hold people accountable. Culture cannot change unless is “matters to the boss”
- Speak up if you notice something, especially if someone who reports to you (a gentle word from the boss makes a major impact)
- Use loss control procedures (i.e. marking and insuring U equipment valued in excess of \$2500)
- Ask, “how would this use look to a reporter or legislative auditor?”

#3 FINANCIAL

Common Mistakes/Examples:

- Poor cash management (recordkeeping, right accounts debit/credit)
- Poor management, account allocation, and recordkeeping for complex projects (e.g. multiple funding sources)
- Conflict of interest with vendor/impermissible U gifts (U limit is \$5), also state law, and includes things like lunches
- Misclassifying “grants,” “gifts,” and “sales”
- Not running gifts through U Foundation, grants through SPA, and sales through External Sales
- Making “gift” to your department, exercise control over how it is spent, and taking a tax deduction as a “gift” (contrary to IRS regs)
- Not identifying income activity as a “external sale” and collecting/remitting required sales and other taxes
- Not correctly allocating expenses among ISOs, External Sales, and grants
- Not keeping required records to verify “legitimate business and entertainment” expenses per IRS rules
- Inaccurate invoicing
- Not documenting basis for vendor selection and reasonable price for purchases
- Allowing prohibited costs in ISO rates, allowing “unapproved” projects to use federally subsidized ISOs
- Not timely reconciling accounts

Risks/Consequences:

- Tax liability for donor if funds do not meet IRS standard for a “gift” and is really a grant, tax liability for unidentified sales
- Incorrect allocations mean you pay the wrong amount in taxes (maybe too much or too little) or fail to collect required taxes
- Fines
- Required to return funds to sponsors if can’t justify expenses with records
- Untimely reconciliation makes it more difficult to correct mistakes

Practice Pointers:

- The more you have to give back to the “donor,” the more it looks like a sale or grant and less like a gift.
- Always contact U Foundation to facilitate gifts/paperwork, etc.
- Consult SPA or External Sales if any question about “grant” or “sale”
- Send staff to refresher training on recordkeeping.
- Pursue bad debt by filing a claim/judgment etc. (failure to reasonably pursue bad debt makes it not deductible)
- Don’t allow anyone to approve their own expense requests

#2

DELEGATION OF RESPONSIBILITY

Common Mistakes/Examples:

- Delegating responsibility when not permitted by law, regulation, or U policy
- Delegating responsibility to someone who lacks the expertise to do what is required or to detect problems presented (i.e. “can this person really be an effective study coordinator?” “can this student worker really be an account manager”)
- Delegating important tasks to someone who does not have the time or resources to do the job effectively
- Delegating responsibility to someone who is not trustworthy
- Not making sure the person you have entrusted with duties understands and has accepted those responsibilities.

Risks/Consequences:

- Financial loss
- Small problems are not caught, and become major problems because of length of time problem went on before detected
- Fines, penalties, regulatory sanctions
- Poor records to justify actions

Practice Pointers:

- Do meaningful oversight (i.e. ask for quarterly report on important activities, or review other documentation to ensure tasks you have delegated are being carried out correctly and the delegatee knows you will be looking)
- Schedule a meeting with staff to whom you believe you have delegated responsibility and ask them to explain what they believe they are responsible for; memorialize understanding in roles and responsibilities document
- Assess your major responsibilities, identify who is responsible for those, document them, and meet with parties to ensure understanding
- Use systems to ensure integrity (i.e. dual signatures on certain expenditures)
- Be realistic: how much more work can your “star” really do well?
- Do meaningful reference/background checks for those with financial authority
- Remember, *delegation* is not *abdication*

#1

TONE AT THE TOP

Common Mistakes/Examples:

- Allowing double standards to apply among any groups for U-Wide or Unit-wide policies
- Shopping around, or instructing/allowing others to knowingly shop around for answers to work around rules
- Not setting a visible personal example, e.g. expense reports, vacation, etc.
- Assuming you don't have any compliance issues because nothing has "gone wrong" yet (need to proactively identify and manage risk)
- Failing to follow-up on a compliance issue because it is "not your job" or not in your area. It's everyone's responsibility.
- Asking staff, student or another to violate any U policy or Rule (sets a precedent that may cause worse problems than the particular rule at issue)
- Permitting any retaliation (even cold shoulder) when someone raises a compliance issue; making someone who raises an issue feel like a "putz"
- Not doing reasonable monitoring (accounts, "high risks" in your area)
- Relying solely on central audits, or another office to identify potential problems

Risks/Consequences:

- Unlikely to prevent problems, and instead find out about them because they happen
- Small problems silently become big problems
- Whistleblowers

Practice Pointers:

- Encourage open discussion of ethics in the workplace, through staff meetings, other communications, including ones you initiate. Example, show the U's ethics video at www1.umn.edu/ohr/orientation/ovideo.htm and have discussion of how it impacts the office. Send out Code of Conduct Summary at www1.umn.edu/twincities/code/.
- Discuss the Code of Conduct, ethics, and how they apply to a position during performance review, or ask the employee to explain how they see ethics and integrity interplay in their jobs.
- Have an "open door" policy to bring problems to you and make it easy for people to bring them. (Studies shown that 1/4 of employees have observed misconduct in the workplace.)
- Reward those who identify problems, and sanction those who knowingly do not
- Invite a speaker to discuss workplace ethics to department or collegiate meetings
- Send regular (semi-annual or annual) e-mail out explaining policy to encourage reporting of problems, explain different places to report and protections (e.g. Designated Key Administrators, U Hot Line (Ureport))
- Establish transparency in all compliance matters in your area!