



KEY CLAUSES

Drafting Considerations for a Notice Clause

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Introduction



One of the most overlooked provisions in a contract is the notice clause. Some may think it's just a list of addresses and email, but what appears to be a miscellaneous section at the end of the contract can have significant

consequences. Was the message delivered? Was the delivery procedure followed? Did the counterparty use ambiguous language resulting in confusion? A lot can go wrong when it comes to contractual communication.

A contract's notice provision establishes a mutually agreed-upon mode of communication between the parties. Comprehensive notice provisions can reduce the level of uncertainty surrounding communication delivery, receipt, and proof.

Notice clauses must be thorough enough to protect all parties in a contract. In this guide, we'll discover why notice provisions are worth paying close attention to. By using the ideas mentioned in this eBook, you'll be able to draft exhaustive, effective, and explicit notice clauses.



Table of Contents

Introduction	2	What is a Notice Clause?
Three Drafting Considerations	4	
	5	
	10	Notice Clause Checklist
Sample Clause	12	
	14	Conclusion
About Name of Person	15	



What is a Notice Clause?

**NOTICE PROVISIONS MUST BE ENABLERS.
DRAFT WITH THAT MINDSET.**

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Clear communication enables the successful performance of any contractual obligation. Notices are critical in laying out clear, acceptable, and official communication channels between parties in a contract.



A notice provision allows communication of matters that affect contractual relationships. It must include the methods of serving notices and the consequences of not complying with the clause. The notice provision allows parties to consider the direct and indirect issues affecting a contract.

A notice clause should include the following:

- ✓ Information a notice should contain
- ✓ Points of contact and their details
- ✓ Method of delivery
- ✓ Language of the notice
- ✓ Time limits for sending the notice
- ✓ Whether approved methods of communication are flexible in emergencies
- ✓ When and in what form communication will be received
- ✓ Purpose of communication

Non-compliance with notice clauses leads to invalid notice delivery, causing contractual ineffectiveness. Don't overlook notice-clause compliance; providing a valid notice may be a prerequisite for allowing the benefit of certain rights in an agreement.

A notice clause must elaborate on the instances that could trigger a notice. A notice is served when a contracting party wishes to:

- ✓ Take legal action
- ✓ Furnish information or details
- ✓ Notify about a breach of contract
- ✓ Notify about a change in the address communication specifics
- ✓ Terminate or cancel a contract.
- ✓ Make a request or provide approval under the contract
- ✓ Deliver money or request overdue payment
- ✓ Notify the discussion of a renewal.
- ✓ Compel the performance of an obligation or choose to exercise a contractual right
- ✓ Waive a requirement under the contract



Three Drafting Considerations

Let's consider some ideas to help you draft thoughtful notice clauses.





1 Three Core Elements of a Notice Clause – The Who, Whom, and How

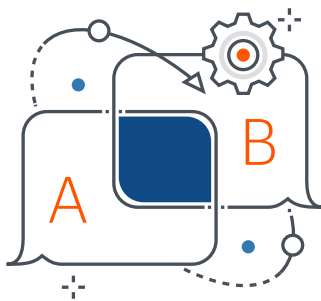
Use these three notice-clause elements to avoid clumsy and directionless notice clauses.



Who is Sending the Notice?

Isn't the sender obvious? It would be the party that wishes to communicate something important in connection with the contract, right? It might not be that simple.

If parties A and B sign a contract and party A requests due payment from party B, naturally, party A is the "who." When a company is involved, the process may look different. A company cannot send notices unless someone at the company has been given the authority to do so. You need to include these details in a notice clause. If a company is a party to the contract, specify who in the company is authorized to receive and send notices on its behalf. The person's name, email, address, and designation should all be clearly spelled out. As an added safeguard, it's a good idea to mandate a signature section when sending a notice.



To Whom is the Notice Addressed?

Think about whether you're sending a notice to a person or a company. Make sure to spell the designated recipient's name correctly and include the correct address or email. If a company is a party to the contract, identify the recipient's position in the company, in other words, to whom the notice is addressed.

If you only include the recipient's name, which may seem obvious, keep in mind that they may leave the company or their position may change. It's a good idea to include the recipient's designation so that messages don't go unnoticed or go to the wrong person. For formal, contractual communications, prefer to use a company email address.

How will the Notice be Delivered?

The delivery mode of the notice should be specified, whether it's by registered email, hand, speed post, overnight courier service, or telecopy. It's essential to choose a method that provides proof of delivery.





2 Delivery of Notices

Draft notice clauses that eliminate communication barriers.



Defining a delivery schedule for notices is an important component of a notice clause. To ensure that the other party cannot claim they did not receive notices, drafters must include all nuances regarding notice delivery. A good notice clause should discuss the occurrence of delivery thoroughly; this is one of the most contested issues.

You don't want to find yourself in a situation where the other party denies the delivery of notice. System errors, logistics issues, non-functional servers, and incorrect email addresses could be the reasons the other party is counting on to use against you in a dispute.

Have a system in place to track when the notice was delivered. Reduce the risk of delivery by requiring the receiving party to acknowledge or sign the notice and return it. In an email notice, an acknowledgment can be requested.

A notice can be deemed served if

- ✔ A specified time has elapsed from the day
- ✔ It was sent. the email has been sent by the sender and the sender's email service has not returned any errors in relation to this email

Deemed receipt in a contract would mean that a notice was delivered from the sender's side unless the recipient can prove otherwise. Always remember to keep proof of delivery of the notice.

For example, certificates of posting, recorded delivery slips, fax transmission reports, or email-tracking receipts. Overriding deemed delivery would require the receiver to prove non-delivery of such notice.

Most contracts require notices to be sent on "business days," which most contracts define as days when banks are open or certain criteria are met in a particular jurisdiction. Some contracts don't identify business days and leave the interpretation to the parties. Be explicit when it comes to definitions and incorporate mutually agreed terms effectively.

Receiving a notice and deemed delivery are two different things. A notice issued on Tuesday by courier and received the following Monday is delivered on Monday, but it may have been deemed received on Thursday according to the mailing rules. When you factor in COVID-19, this can become an escalated issue; especially if offices aren't operating at full capacity, are closed, or if the concerned person isn't present despite the office being open. This can result in additional delays, lost records, ignored notices, and disputes. Unless tailored to that reality, most notice provisions in contracts will deem notice received when, in fact, your business was unable to receive it. Drafters must consider these factors, discuss them with the parties, and agree on a workable mechanism for each eventuality.



3 The Three Cs of Notice Clauses – Comprehensive, Consequences, and Changes

Attention to detail and relevant pre-emption are two core rules for drafting a good notice clause.



Make it Comprehensive

A notice clause should specify all the elements that a notice should contain when being sent. For example, a notice clause could mandate using letterheads or having seals or stamps. These could also be a criterion to ensure what constitutes notice in itself.

A comprehensive notice provision should consider all delivery methods; specify the who, whom, and how; indicate proof of delivery; include all party details; add language that covers all repercussions.



Address Consequences

Questions to consider:

What happens if the notice isn't delivered effectively?

What happens if a party fails to acknowledge a notice?

What happens if a party does not provide a notice in a situation where they should have?

What are the obligations of parties when they wish to initiate a dispute?

What happens when parties wish to make changes to the notice provision?

If a party doesn't follow a specific method of delivery, what kind of actions lie against them?

What happens if a party does not deliver the notice in the agreed format? Would it be invalid? If yes, what are the penalties?

Is there a specific format for a particular type of issue relating to notices? For example, does a cure period, contract default, contract termination, or a contract assignment notice mandate the inclusion of a specific format?

What could be the limitations if we include auto-acceptance and rejection of notices?





3 The Three Cs of Notice Clauses – Comprehensive, Consequences, and Changes

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Address Consequences (continued)

Not anticipating and including consequences within the notice provisions could have negative implications. For example, if a party fails to receive timely notice, they may be unable to address the issue raised in the notice promptly, miss a crucial court or paperwork deadline, lose the opportunity to cure any alleged breach, cure a specific obligation, or undertake performance in the contract. This leaves little time for a party to fix issues because the notice was deemed delivered while the actual receipt was delayed.

Using emails might be the best delivery option, considering the state of the world after COVID. Include provisions for email communication in new contracts and amend old contracts that use traditional communication methods. Agreeing to use emails “unofficially” could be a problem, if the other party continues to use older methods, causing delays. It’s always good to get everything on paper and make sure everything is mutually acceptable.

Consider Changes

Include the procedure to amend the details of a notice clause. Changes could range from party details, a different address or email ID, the name of a company (in case of a merger), or the designation of the receiver.

To minimize ineffective communication, the notice clause should additionally allow a notice to initiate the changes or revisions. Make sure to incorporate this from the start. Communicate over the phone for existing or older contracts, discuss how revisions can be made immediately, and update your notice clauses.





Notice Clause Checklist



- Focus on specificity. Don't leave room for misinterpretation. Define terms clearly and don't leave them open-ended. Example: time and date-sensitive cases.

- List all the cases when a notice clause would be triggered.

- Include a format for the notice.

- Decide who will receive the notice, who is authorized to send it, and how it will be sent.

- Make your method of delivery clear. Don't state overnight courier and go on to say email as well. Specify if it's "or," "and," or a combination of methods.

- Make sure the email recipient includes their designation.

- List all the "deemed to have received" situations.

- Include ramifications of sending an invalid notice.

- Specify the language of the notice as per the convenience of the parties. Example: English or bilingual.

- Include the consequences of not following the notice provisions.

- Cross-check the notice clause with the entire contract for conflicts. Look for inconsistencies within the contract.

- Cover all consequences specific to your contractual relationship.

- Ensure the timelines within the notice provision are reasonable and acceptable to both parties. Include the associated sanctions when a party fails to adhere to timelines.

- Strictly hold yourself to the standards mentioned in the notice provision. If both parties have agreed to notice for termination by courier service, then you must use that delivery method. If you opt for email, it would be invalid. Sending an invalid notice is a breach, giving the other party a right to terminate.

- Keep an eye out for double conditions for sending a notice. You might have to send a delivery notice by way of courier and within a stipulated time. Make sure to fulfill both of those conditions.



Notice Clause Checklist



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- Meet all the contractual requirements when sending and receiving a notice.

 - Opt for the email option as much as possible. It's best for both parties to use a separate email for notices so that they don't get lost in a recipient's overflowing inbox. Email is also more environmentally friendly and relevant in today's times.

 - Use multiple recipients to ensure timely receipt by the most relevant person.

 - To avoid the email landing in the spam or junk folder, make sure to mark the specific email addresses as safe.

 - Require parties to send an email with a clear subject line that specifies it is a notice and a reference to the contract and its sections (e.g., "Notice as per section x of the Franchise Agreement").

 - Examine your contract terms carefully, as some notices may be acceptable if delivered via email, while others within the same contract may not be acceptable.
- Provide a mechanism to "remedy" any mistakes in the first instance. Don't jump directly to filing disputes. Draft a clause with a cure period and appreciate the other party's situation.

 - Draft the provision using COVID-19 appropriate language. Be mindful of the protocols and limitations imposed on parties around the world and within your jurisdiction. Focus on practicality and save unnecessary costs. Opt for physical notices only when necessary. A good test should be: "Will this notice be ineffective if sent via email or a digital medium?" If not, don't waste your resources.

 - Pre-empt potential challenges in your contract.

 - Include language that allows future revisions to be made in the notice clause.





SAMPLE CLAUSE

“Any and all notices under this Agreement for the Purposes (Define) mentioned below shall be in writing and shall be served by Registered Mail (Define) to the respective parties at the following addresses:

To [Party 1]: [Name]
[Address]
[Attention:_____]
Telephone: (____) ____ - ____
Email: [____@_____]

To [Party 2]: [Name]
[Address]
[Attention:_____]
Telephone: (____) ____ - ____
Email: [____@_____]

A notice clause must be sent for the following purposes including but not limited to:

- Termination of the contract*
- Contractual breach*
- Waiver of a requirement*
- Change in party details*
- Initiating a dispute*
- Compelling the performance of an obligation*
- Exercising a contractual right*
- Informing the counterparty about relevant and important updates*
- Making a request*
- Notifying a discussion for renewal*

The Notice must be sent with the letterhead of the company. It must specify the subject line as “Notice as per section [x] of the Service Agreement.” The language of the Notice shall be English.

The receipt of the Notice must be duly Acknowledged (Define) by the Receiver (Define) for its acceptance within 7 Business Days. (Define Business Days) The notice shall be Deemed Served (Define what it means for both parties) if (1) a period of 7 Business Days (time-sensitive) has elapsed from the date of the notice; (2) the receiver does not Acknowledge (Define) the receipt of the email for 7 Business Days from the date of the notice.

A party may change their address, telephone number, email address, the person to whom a notice will be sent, or any other relevant party detail by giving notice of such change to the other party.

If the Notice sent is Invalid (Define), the other party shall have the right to terminate the contract. The party shall also have an obligation to provide a Cure Period (Define) to the defaulting party to remedy the mistake. The grant of a Cure Period of 30 Business Days shall be mandatory for both parties under this Agreement and the same must be notified immediately.”



Notice Clause Checklist



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When sending a notice, keep in mind:

- Which clause the notice is in reference to
- A detailed description of the event
- Whether or not the event is likely to cause a delay
- Details of the mitigation strategies to be implemented
- Whether the situation calls for a meeting between the parties
- Effect on the contract value

Ask three questions to check if your notice clause is foolproof:

1.

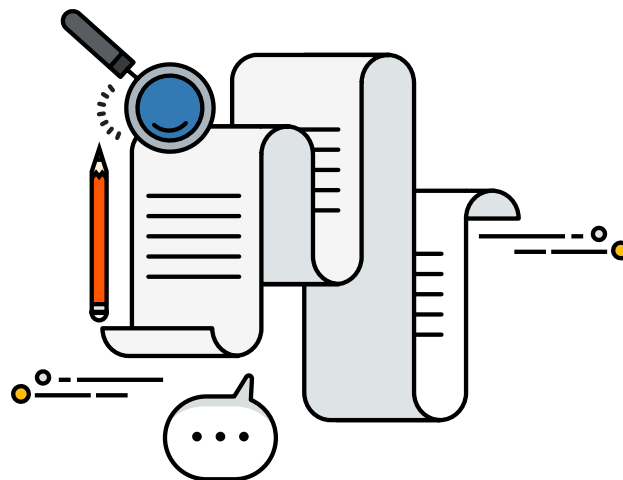
Does this clause reduce the scope of future disputes regarding communication?

2.

Does this clause address every communication detail?

3.

Are all the parties on the same page when it comes to the interpretation of this clause?





Conclusion



The secret to the success of a contract lies in its notice provision.

Contract clauses have not always kept up with the intended or easiest modes of communication. More people want to use email and fewer want to use courier services.

Overall, a contract's notice clause should eliminate or substantially reduce disagreements between parties over communications. An inadequately drafted notice clause can compromise the validity of a notice leading to serious consequences.

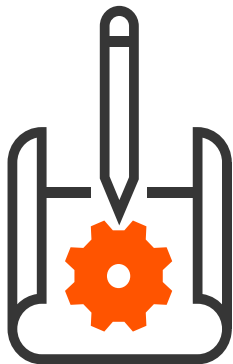
A notice clause sets out an accountability mechanism between the parties involved. A notice clause should always be linked to the contract it's a part of. Parties must use relevant drafting language to convey the importance of the fulfillment of party obligations on time. A notice clause should facilitate the performance of the contract and avoid miscommunication between parties.

With notice clauses, it's important to do three things: review, revise, and refer. Review clauses against the notice clause checklist, revise the clause to make it relevant to the changing conditions and refer to the clause when in doubt.



ABOUT

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Samridhi Jain is a legal content writer and contracts enthusiast. She helps law firms, lawyers, and legal tech companies with their content requirements. She has helped independent clients with various contracts as well.

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