

CONSULTING AGREEMENT KIT

Consulting arrangements raise many of the same issues as other industry agreements (e.g. sponsored research, material transfer and confidentiality agreements). In addition, you need to ensure such arrangements do not violate conflict of interest rules. Consulting arrangements may also raise personal issues requiring the attention of your own attorney (such as tax and stock ownership issues).

This "Kit" is not legal advice or a substitute for legal advice from your attorney. But it is intended to alert you to pertinent issues so you can look carefully at consulting documents that companies offer you. *Generally, consulting agreements are very negotiable; companies are eager to enter into consulting agreements with you because of your expertise and reputation.* Accepting a company template without discussion or additional review may be problematic.

A chart, starting on page 3, compares the provisions typically seen in a first draft consulting agreement with those you should negotiate. As you will see, many terms need to be addressed. For example, HMS insurance generally does not protect you if you are sued for services under or related to a consulting agreement.

Furthermore, since consulting is a private activity, you will not be considered a Harvard employee when providing consulting services, and Harvard will not indemnify you or provide you any legal defense if you are sued and/or found liable as a result of your consulting activities.

Simple issues like travel reimbursement may need to be addressed as well.

The Office of Academic and Research Integrity is pleased to be able to offer the HMS community several resources, including agreement review and the use of templates. Please contact us at: consulting@hms.harvard.edu or (617) 432-3884.

While the chart summarizes many issues, "conflicts" deserve special attention. There are generally three ways your consulting agreement may conflict with your academic, clinical and research appointments:

First, certain consulting agreement provisions are likely to place you in a position where you cannot meet academic obligations without breaching your consulting agreement. For example, if you agree to broad "noncompete" provisions, or if you consult in a broad "field" overlapping your academic work and assign all inventions and data to the company, this will constrain your academic research, and may place you in violation of federal regulations and NIH policy concerning public availability of scientific discoveries. If you substantially use any HMS resources in doing such consulting and assign the invention to the company, you will likely be in violation of the Harvard University [Statement of Policy in Regard to Inventions, Patents and Copyrights](#), and you may have placed yourself in the middle of a potential lawsuit between the company and Harvard.

Second, if your agreement violates the conflict of interest policies and regulations of Harvard Medical School, HHMI, NIH, or other sponsors, you may endanger your academic appointment and funding. Furthermore, you may incur direct government penalties.

For example, the Harvard Medical School Conflict of Interest Policy generally limits receipt of research funding from companies depending on the form and amount of compensation. The Policy also requires advance review of arrangements which shift research from the academic to the corporate environment, and certain board and other positions.

The NIH requires you to report, and HMS to reduce, manage or eliminate, any conflict of interest. A "conflict" exists if you have any financial relationship or interest, above a certain threshold, in any entity which may be affected (positively or negatively) by your NIH-funded research. If you consult for a company in your area of NIH-funded research, and are compensated in securities or above the thresholds, it is quite likely you will have a conflict of interest to report to the HMS Office for Academic and Research Integrity. You are encouraged to discuss whether a conflict exists with the HMS Dean for Faculty and Research Integrity or the Executive Director of Research Integrity and Compliance before signing a consulting agreement.

Third, even if your arrangement appears acceptable, it may conflict in practice with civil and criminal laws. For example, if you are a clinician who is paid above market or fair value for consulting services to a pharmaceutical company, the arrangement can subject you to criminal prosecution and civil penalties if the government believes there is a link between the payments and your referral and prescribing practices. Actions you take with unregistered stock may conflict with various federal and state laws limiting the liquidity of such stock. Similarly, trading stock, when you have "inside" knowledge because of the consulting arrangement, may subject you to criminal and civil penalties for insider trading. These violations may also violate Harvard policy. Therefore, you should ensure that the compensation you receive is reasonable (e.g. not excessive or clearly above market), and you should consult with your own attorney carefully before you exercise any rights or options involving securities you receive as compensation.

The chart below contrasts typical company consulting agreement provisions against those in Harvard's model agreement. Remember that this is for guidance purposes only, and that your own attorney should examine the impact of any agreement on you based on its specific terms and your personal objectives. You are welcome to send questions and a draft of the agreement to the Office of Academic and Research Integrity for discussion and review, recognizing that it can not address personal issues for you.

<u>PROVISION</u>	<u>TYPICAL COMPANY DRAFT</u>	<u>HMS MODEL AGREEMENT</u>
SCOPE OF SERVICES	Broad - includes your academic work.	Precise; carves out your academic work, or preserves your rights in areas of overlap.
SCHEDULING	Whenever they want you.	Mutual agreement. You can participate by telephone.
REIMBURSEMENT of your expenses	Depends on undisclosed company 'travel policies' and documentation requirements.	They make travel arrangements for you, and reimburse all other reasonable expenses promptly. Company policies have to be disclosed in advance or won't apply.
COMPANY CONFIDENTIAL INFORMATION <u>Definition</u> <u>Publication and control of data</u> <u>Exceptions to what is considered confidential information</u> <u>Return of copies</u>	<p>1. Defined to include (a) anything that you receive from Company; and (b) anything you prepare for Company or using its information, even if the use is not part of the consulting, overlaps your academic work, and is an entirely new idea that you could publish without publishing the Company information. Includes all data.</p> <p>2. Company has exclusive control for all purposes. You may not publish or use the data for any purpose without the Company's permission.</p> <p>3. You have the burden of proving exceptions, or you are in breach.</p> <p>4. You must return all copies at end.</p>	<p>1. Limited to Company's own information, and information prepared by you that doesn't overlap your academic work.</p> <p>2. Not a breach for you to use data and Company confidential information for academic work. Your right to publish is preserved.</p> <p>3. Exceptions apply automatically.</p> <p>4. You can keep one copy for files.</p>

<p><u>Company's obligation to give you the information you need to reach sound conclusions</u></p>	<p>5. Even if you are on its SAB, Company has no obligation to give you full and fair information relevant to your judgment and conclusions.</p>	<p>5. Company must give you all information you think is relevant to forming your conclusions -- especially important if Company will publicize your conclusions.</p>
<p>DISCOVERIES</p> <p><u>Who owns and controls discoveries?</u></p> <p><u>Do you get further payment for use of your discovery?</u></p> <p><u>Can you do research on your discovery? Can you obtain research funding to do so?</u></p>	<p>1. Without further compensation, Company owns all of your innovations and discoveries, if they arise during the consulting, or result from it, or use any company information or "<i>relate</i>" to the same topic as the consulting.</p> <p>2. Since Company owns all discoveries, as broadly defined above, you cannot do further research on discoveries without Company's permission. No requirement that Company fund such research even if it permits it.</p>	<p>1. Company owns none of your discoveries if they overlap your academic work; instead discoveries are disclosed to both company and Harvard, and Company has an option to license them. Any license fees and royalties will be shared with you under Harvard licensing policy.</p> <p>2. Your right to continue research is preserved. If you wish, HMS Office of Technology Development will seek industry funding for your research in connection with licensing the discovery.</p>
<p>LIABILITIES</p> <p><u>Promises you make creating special personal liability.</u></p>	<p>1. You "represent and warrant" that the Agreement complies with all institutional policies, that it always will, that you will never use academic facilities or resources, that you'll never do anything inconsistent with the consulting agreement, and that you'll never use anyone else's confidential information in the consulting. If you breach these, you are personally responsible for all damages (for example, all the loss in</p>	<p>1. You make no representations and warranties except that you know of no inconsistent agreement, and will not knowingly and intentionally enter into an inconsistent one.</p>

<p><u>Do you have insurance coverage for any lawsuits that arise out of the consulting or its subject matter?</u></p>	<p>value to the Company if it does not own an invention because Harvard owns it, and all lawsuits by any other companies for which you consult claiming that something you learned from one was wrongfully used by another). You are personally liable even if the lawsuit is unfounded and unfair.</p> <p>2. You have no insurance coverage for defense or payment of any lawsuit that arises out of or relates to the consulting (for example, a product liability lawsuit which includes you because of your role on the Company's scientific advisory board).</p>	<p>2. The Company provides you with insurance for a defense and for all costs.</p>
<p>USE OF YOUR NAME AND PHOTO</p>	<p>Company can use as it chooses.</p>	<p>Company needs your permission, and must describe your role accurately. Company cannot use you as a publicist with investors, without your consent.</p>
<p>ASSIGNMENT</p> <p><u>Transfer of your obligations to any other company</u></p>	<p>Company can transfer your obligations to any other company without your permission, so that you end up consulting to a different company than you intended, including one you are uncomfortable with.</p>	<p>Your obligations cannot be transferred to anyone else without your permission.</p>
<p>TERMINATION</p>	<p>Company can terminate without or without cause on little notice. Costs you've incurred already may not be reimbursed.</p>	<p>Either party can terminate with or without cause. All costs you incurred are covered.</p>