



Nathan Deal
Governor

Ronald W. Jackson
Commissioner

September 5, 2014

To whom it may concern:

The Technical College is one of 23 public colleges comprising the Technical College System of Georgia, a state agency within the executive branch of Georgia's government. As a public institution funded by state appropriated dollars, there are statutory and constitutional regulations governing their ability to enter into contracts, including clinical contracts. These regulations may not be applicable to the private clinical partners with whom you may also work, and therefore may require some deviation from the standardized clinical contracts you normally utilize for clinical agreements.

In order to assist you in understanding these regulations and hopefully minimize any delays in establishing clinical arrangements for our students, I have listed some of the most common contractual provisions to which our Colleges are unable to agree.

1. Indemnification/Hold Harmless Clauses

There are three separate legal principles that prohibit the College from entering into an agreement to defend a clinical partner or other third party and/or to hold them harmless from any liability, personal injury and property damage arising out the clinical relationship.

First, indemnification provisions have been determined to be void as unauthorized attempts to contractually waive the State's sovereign immunity. An opinion of the Attorney General of Georgia (the "Attorney General") counsels that an unauthorized attempt to waive sovereign immunity through an indemnification agreement would be ultra vires and void. 1980 Op. Att'y Gen. 80-67. The Supreme Court of Georgia confirmed this position, holding that an indemnification clause by a state governmental entity is invalid where the entity lacks the express statutory power to waive its sovereign immunity. *CSX Transp., Inc. v. City of Garden City*, 588 S.E. 2d 688, 690 (Ga. 2003).

Second, indemnification provisions violate the gratuities prohibition of the Georgia Constitution. The Georgia Constitution prohibits the granting of any donation or gratuity or forgiving any debt or obligation owing to the public. Ga. Const. art. III § VI, ¶ VI(a). It also prohibits the granting or authorization of extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into. *Id.* An opinion of the Attorney General also opines that indemnification provisions are gratuitous undertaking in violation of the gratuities prohibition. 1980 Op. Att'y Gen. 80-67.

Third, indemnification provisions violate the debt restriction on Georgia agencies and authorities. The Georgia Constitution prohibits the credit of the state from being pledged or loaned to any individual, company, corporation or association. Ga. Const. art. VII, § IV, ¶ VIII. Again, the Attorney General has interpreted the constitutional debt restriction as a prohibition upon a state agency from contractually agreeing to any indemnification and “hold harmless” provisions. 1980 Op. Att’y Gen. 80-67. An indemnification provision is open-ended in nature and thus violates this debt restriction.

2. Governing law/venue in any state other than Georgia/waiver of jury trial or mandatory alternative dispute resolution

There are two statutes that prohibit the College from agreeing to jurisdiction or governing law outside of Georgia. Georgia law requires that actions be brought only in the superior court of Fulton County, Georgia when involving an alleged breach of written contract by a state agency. O.C.G.A. § 50-21-1(b). Additionally, Georgia law requires that all tort actions against Georgia under the Georgia Tort Claims Act be brought only in the state court or superior court of the county in which the alleged loss occurred. O.C.G.A. § 50-21-28. Tort actions based on alleged losses sustained outside of Georgia must be brought in the Georgia County of residence of the employee or official upon whose actions the claim is based. Id. As such, the College can only agree to jurisdiction in Georgia.

In addition, the College is unable to agree to any arbitration or waiver of jury trial contract provisions. The Attorney General has exclusive jurisdiction in all legal matters related to the executive branch of Georgia government. O.C.G.A. § 45-15-34. The Attorney General is the “legal advisor of the executive branch” and is required to “represent the state in all civil actions tried in any court.” O.C.G.A. §§ 45-15-3(4) & (6). Whether a matter involving the College is litigated before a jury or resolved through arbitration is a decision within the exclusive purview of the Attorney General and cannot be contractually limited or altered by the College.

3. Confidentiality/Non-Disclosure

The College is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.) which allows any individual to view its records and to make copies for a fee, unless the records are specifically exempt from disclosure by state or federal law. While many of our student records are exempt from disclosure, the documents, contracts, electronic data, e-mails and other writings generated or received by the College during normal business operations are subject to public disclosure. The written agreement with the College, by its very nature, is a public record. As such, the College cannot agree to contract provisions that restrict it from releasing information related to the agreement itself or information that would otherwise be subject to public disclosure under the Georgia Open Records Act. There can, however, be provisions for maintaining the confidentiality of the clinical site’s valid trade secrets, provided the site identifies the information as such when submitting it to the College and it is accompanied by an affidavit affirmatively declaring it as a trade secret. See O.C.G.A. § 50-18-72(a)(34). In addition, confidential health information, such as that protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), would **not** be subject to disclosure by the college under the Georgia Open Records Act. See O.C.G.A. § 50-18-72 (a) (1) and (2).

4. Insurance

As part of the Technical College System of Georgia, the College is self-insured under the State of Georgia, Department of Administrative Services, Risk Management Division, against employer liability and tort claims, including comprehensive automobile liability, in the amount of one million (\$1,000,000) per person and three million (\$3,000,000) per occurrence; the College also maintains workers' compensation insurance for its employees through the State of Georgia and often has professional liability insurance for its students and instructors working at the clinical site. The terms and conditions of this coverage must be confirmed with the individual college.

Provisions mandating that the College purchase additional insurance, increase policy limits, or name the vendor or other third party as an additional insured party cannot be included in contracts with the College. The College may be liable only for personal injury or property damage caused by acts or omissions of its employees in the performance of the contract to the extent provided by the Georgia Tort Claims Act (O.C.G.A. § 50-21-20 et seq.).

5. Unknown Damages, Costs or Expenses

The legal principles that prohibit the College from agreeing to indemnification clauses also prevent it from entering into any contract that requires it to pay attorneys' fees or any other expense that cannot be calculated. The College is specifically prohibited from agreeing to pay unknown damages of a third party or paying a contract termination fee.

We have worked successfully with many industries that have provided our students with applied learning experiences in their work-sites; these partnerships have been critical in the development of a well-educated, globally competitive workforce for the state of Georgia. We hope you too are able to recognize our value as a partner and will accommodate these contractual restrictions in your negotiations with the College. If you have any questions or concerns regarding the College's ability to participate in clinical programs with you, you may contact the College's Vice President of Academic Affairs or the Technical College System of Georgia's Office of Legal Services.

Sincerely,

A handwritten signature in purple ink that reads "Linda Osborne-Smith". The signature is fluid and cursive, with the first name "Linda" being the most prominent.

Linda Osborne-Smith
General Counsel

Technical College System of Georgia