



Contracts and MOUs: Understanding Key Terms

Our partners often ask us to explain the difference between a contract and a memorandum of understanding (MOU). Although there can be legal distinctions between the two types of documents, there may be no legal or practical difference if they are written with similar language. The key is whether the parties intend to be legally bound by the terms of the agreement. If so, they have likely created a legally enforceable contract regardless of whether they call it a contract or an MOU.

A *contract* is a legally enforceable agreement between two or more parties that creates an obligation to do (or not do) a particular thing. The parties must intend to create a legally enforceable agreement, but they need not intend to create – or even understand – that they are entering into a “contract.”

Generally, parties create a contract the moment that one party’s offer to do (or not do) something in exchange for something else of value is accepted by the other party, either expressly or impliedly. Most commonly, contracts involve the *exchange of promises*, e.g., “I promise to paint your house, if you promise to pay me \$200.” The *terms* of the contract (i.e., the who, what, where, when, and how of the agreement) define the promises that each party has made to the other.

Another key characteristic of a contract is that a court will enforce its terms if one of the parties *breaches* the contract (i.e., a party fails to carry out a promise). In special circumstances, a court may order a party to actually perform its promise. Most often, however, a court simply orders the party in breach to pay the other party enough money so as to return the non-breaching party to the same position it would have been in had it performed the promises as outlined in the contract.

Similar to a contract, a *memorandum of understanding* is an agreement between two or more parties. Unlike a contract, however, an MOU need not contain legally enforceable promises.

While the parties to a contract must intend to create a legally binding agreement, the parties to an MOU may intend otherwise. For example, an MOU may recite that the parties “agree to promote and support the joint use of facilities.” This type of provision establishes an important public statement of cooperation, but it does not constitute a legally enforceable obligation. Alternatively, an MOU may outline the terms of an agreement but state that each party’s responsibilities are only enforceable “in the event that the parties’ governing boards decide to enter a joint use agreement.”

Additionally, a non-legally binding MOU may be useful to serve as an agreement between two or more departments within a single public entity. For example, in large cities where the school district is considered a department of the city – and not a separate legal entity – a contract between the city and the school district may not be legally appropriate. Instead, the city (or one of its departments) and the school district may use an MOU to accomplish their desired goals.

In the context of joint use agreements, an MOU is often used to define the expectations and responsibilities of each of the parties. These MOUs typically address issues such as: (1) who bears responsibility for the costs of maintenance and repairs, (2) insurance and liability, (3) staffing and communications, and (4) conflict resolution. Whether the terms of these agreements are legally enforceable as a *contract* ultimately turns on the intent of the parties. Therefore, parties to a joint use agreement should address the legal status of their agreement early in the negotiation process.

Parties often draft agreements with language that blurs the lines between a contract and an MOU. The key is to focus on whether the parties intend to be legally bound by the terms of the agreement. Although what the parties call the written document may provide evidence of their intent, it does not determine the type of agreement the parties have created.