



August 17th, 2017

MEMORANDUM

FOR: University of Massachusetts – All Campuses
FROM: Office of the General Counsel
SUBJECT: Indemnification - Authority of the University

This memo addresses the question of whether the University of Massachusetts (including the system office and all campuses, departments, units, programs and offices, collectively “University”) may contractually agree to, or provide for, the indemnification of any entity which is not an agency of the Commonwealth, excepting those parties, or in those instances, expressly authorized by the legislature of the Commonwealth.

It is the legal opinion of this office that the University expressly lacks such authority and/or ability and is prohibited from offering such an indemnity. This prohibition is based in the explicit reservation of such authority to the legislature of the Commonwealth of Massachusetts, as stated in Article 62 of the amended Constitution of the Commonwealth,¹ which states in part:

*“The commonwealth may give, loan or pledge its credit **only by a vote, taken by the yeas and nays, of two-thirds of each house of the general court present and voting thereon. The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed.**” [Emphasis Added]*

There is substantial legal authority that makes clear that a contractual obligation of indemnification is a “pledge of the credit” of the Commonwealth and thus would violate the Constitutional prohibition. Moreover, courts have concluded that statutory authorizations that permit public entities to enter into contracts do not authorize indemnity clauses. *Lovering v. Beaudette*, 30 Mass. App. Ct. 665, 669 (1991).²

Accordingly, the Office of the General Counsel advises against entering into any contract or agreement with a term, clause, or provision, which contradicts this Constitutional prohibition. Any such presented clause should be deleted before execution of the contemplated agreement.

¹ Massachusetts Constitution - <https://malegislature.gov/Laws/Constitution>.

² Additional judicial decisions – *Raisman v. Cunningham*, Suffolk Superior Court Civil Action No. 93-5070-G; Opinion of the Justices, 276 Mass. 617, 621 (1931); Opinion of the Justices, 393 Mass. 1209, 1232 (1984); and *Shocrylas v. Worcester State College*, 2007WL3332818 (2007).