



Independent Contractor Agreements

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Q: I UNDERSTAND THAT THERE HAS BEEN RENEWED SCRUTINY OF THE QUALIFICATIONS FOR INDEPENDENT CONTRACTOR STATUS. WHAT NEEDS TO BE INCLUDED IN MY INDEPENDENT CONTRACTOR AGREEMENTS TO AVOID ANY PROBLEMS?

A: To distinguish independent contractor from employer-employee relationships, the most important provisions to be included in an independent contractor agreement are those documenting the individual's independence and control over his or her work. Proper classification of workers as employees or independent contractors is essential, especially in the eyes of the IRS, the Department of Labor and state employment agencies. If a worker is misclassified, the organization may be responsible for substantial federal and state tax, benefits and overtime liabilities. When evaluating whether a person providing services to the association is an employee or independent contractor, an association must consider all information that provides evidence of the degree of control and independence the person will have in performing his or her work.

The facts that provide evidence of the degree of control and independence fall into three established categories—behavioral, financial and type of relationship. Accordingly, independent contractor agreements should provide that, although the individual must report to the organization and follow its policies, the

contractor is responsible for the means, time and manner in which he or she provides services. The organization should not control or have the right to control what the contractor does or how he or she does the work. The agreement also should acknowledge that the contractor may work for others. And, it is prudent to have the agreement explicitly state that the contractor may not speak or act for the organization unless specifically authorized in writing.

Generally speaking, compensation to independent contractors should not resemble payments made to employees. In fact, opportunities for contractors to share profit or loss show greater independence. The agreement also must state the contractor is solely responsible for paying taxes and withholding, for providing benefits for the contractor and his or her employees and subcontractors, and for all expenses incurred in operating his or her business. Ideally, all the foregoing factors, taken together, will help demonstrate that the contractor is in business for him or herself, and not economically dependent on the organization for his or her livelihood.

Organizations must carefully consider and document each of the above factors in the independent contractor's agreement. While there is no established number of factors or criteria that definitively determine that a person qualifies as an independent contractor, the key is to evaluate the entire relationship, consider the degree or extent of the right to direct and control, and to document each of the factors used in making the association's determination. The following are other key provisions to include in independent contractor agreements:

Clarify services, deliverables and timing up front.

Even when a project seems clearly defined at the outset, the independent contractor's view and the organization's view of the "scope of work" may differ. Make sure the agreement specifies the final product and all the elements important along the way: interim reports, phone calls, meetings, access to key contact people and deadlines. Because the scope of the project may change as the project progresses, make sure the agreement requires any changes in scope and cost to be agreed to in writing.

Beware hidden costs or fees.

Fees for the project are inextricably intertwined with the project's scope. The organization must know what costs and expenses are included and what will be extra. The agreement should clearly state whether the fees are estimated or fixed or vary with time spent. The contract should delineate what expenses, if any, the organization will pay or reimburse. If compensation is based on "net revenue," net revenue must be defined.

Own the work product.

A big frustration for organizations is finding out they don't own what they thought they bought. Unless the organization's ownership of the independent contractor's work product is clearly established in writing in the agreement, the creator (the contractor) owns the work, not the person who paid for it. The organization at best only has an implied license to use the independent contractor's work product. And, if third party intellectual property (e.g., software) is necessary to be able to use the work product, the agreement should ensure (1) the contractor has the unencumbered right to use the third party's intellectual property for the organization's purposes and (2) the organization has the right to continue to use the third party's intellectual property—through a

broad license—even after the work is complete or the agreement has been terminated.

Ensure confidential information is protected.

The agreement should provide that the independent contractor will use the organization's confidential information—for example, membership lists, financial data, business plans and the work product itself—only for the benefit of the organization. In other words, the independent contractor may not disclose information to anyone other than the organization or its representatives, such as the contractor's other clients, or use the organization's information in any way that would harm the organization. Provisions prohibiting solicitation of the organization's members or clients may also be important.

Obtain performance assurances.


The independent contractor should be willing to stand behind his or her product or service and warrant that the work will be done professionally and meet other applicable standards in the field (e.g., as a software provider). In addition, he or she also should warrant that the product will not infringe others' copyright or trademark rights.

Include indemnification.

The independent contractor should indemnify the organization for its work and against any representations or warranties made in the agreement. The organization should also consider provisions explicitly limiting its liability to the independent contractor.

Clarify when and how the agreement terminates.

An agreement with an independent contractor should have a specific term, and it should be clear who has the right to terminate the agreement, and under what conditions, before the term expires.

The above list highlights the most important terms for agreements with independent contractors. Other typical contract provisions—notice, choice of law, assignment—also should be included to ensure the organization is well-protected. 

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