

# Key Provisions for Independent Contractor Agreements



## Q: What are the most important provisions for independent contractor agreements?

**A:** 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. Thus, the most important contract provisions are those documenting the individual's independence.

The agreement should provide that, although the individual must report to the organization and follow its policies, he is responsible for the means, time and manner in which he provides services. The organization also should acknowledge that the contractor may work for others, but must avoid conflicts of interest. And, the contractor may not speak or act for the organization unless specifically authorized in writing.

Compensation should not resemble payments made to employees. In fact, opportunities for the worker to share profit or loss show greater independence. The agreement also must state the contractor is solely responsible to pay taxes, withholding and benefits for herself and her employees and subcontractors, and for all expenses in operating her business. Ideally, all the foregoing factors combine to indicate that the individual is in business for herself, not economically dependent on the organization for her livelihood.

The following are other key provisions for 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 in writing.

**Beware of 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. Delineate what expenses, if any, the organization will pay. 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 paid for. Unless the organization's ownership of the independent contractor's work product is clearly established in writing in the agreement, the organization has only 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 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

only use the organization's confidential information — for example, membership lists, financial data, business plans and the work product itself — for the benefit of the organization. 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 also are important.

**Obtain performance assurances.** The independent contractor should be willing to stand behind his 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 also should warrant that the product will not infringe others' copyright or trademark rights.

**Include indemnification.** The independent contractor should indemnify the organization for her work and against any representations or warranties made in the agreement. The organization also should 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 is up.

The aforementioned 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. ■

*The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.*