

CHAPTER 19

CONTRACT LAWYERING: WHAT TO EXPECT

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INDEPENDENT CONTRACTOR OR EMPLOYEE?



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Why Does It Matter?

If a law firm is audited by a federal or state agency or challenged by a worker and is determined to have incorrectly classified a lawyer, paralegal or other service provider as an independent contractor rather than an employee, the law firm could be responsible for:

- unpaid federal and state income and employment taxes;
- pension and profit sharing;
- health, life, disability, and other employee benefits;
- workers' compensation benefits; and
- unemployment benefits.
- failure to provide protected family medical or sick leave,
- violation of discrimination or wage and hour laws,
- failure to comply with I-9 requirements, and
- a host of other employment-related claims.

What State Agencies Audit Employers?

State agencies that audit businesses, including law firms, to determine whether they have correctly classified individuals as independent contractors or employees:

- Department of Revenue;
- Employment Department;
- Oregon Bureau of Labor and Industries;
- Construction Contractors Board;
- Landscape Contractors Board;
- Workers' Compensation Division.

What Federal Agencies Audit Employers?

- The IRS and the Department of Labor both independently audit employers to determine whether the workers are correctly classified as independent contractors.
- The IRS has adopted a multi-factor test broken down into three categories: behavioral control, financial control, and relationships.
- The Department of Labor has recently issued proposed regulations that would assist employers in accurately determining whether a person is an employee or independent contractor.

Department of Labor Proposed Rule

The Department of Labor proposes to adopt an "economic reality" test to determine a worker's status:

- Is the worker economically dependent on someone else or is the worker in business for themselves?
- What is the nature and degree of the worker's:
 - control over the work being performed?
 - opportunity for profit or loss based on initiative and/or investment?
- Factors to consider:
 - What amount of skill is required for the work?
 - What is the degree of permanence of the working relationship?
 - Is the work being performed part of an integrated unit of production?

Each Agency Applies its Own Test

- The various state and federal agencies auditing these relationships each apply different tests and factors.
- The Department of Labor and the Bureau of Labor, Wage and Hour Division, apply an "economic reality" test;
- The Oregon Department of Revenue applies the factors listed in ORS 670.600;
- The Oregon Civil Rights Division and the Workers' Compensation Division apply the "right-to-control" test.

Drafting a Written Agreement

While there is not a bright-line test for determining whether a lawyer/paralegal is an independent contractor or an employee, carefully defining the terms of the relationship in a written contract may be helpful in avoiding an obvious misclassification and limiting the potential risks associated with this type of business relationship.

Contract Terms The Parties May Want To Consider:

- The lawyer/paralegal is responsible for their own income taxes, including estimated tax payments, and self-employment taxes (in lieu of Social Security and Medicare taxes), professional liability insurance, and excess coverage.
- The firm will issue a Form 1099-MISC for the services performed by the lawyer/paralegal unless the firm determines that such Form is not required to be issued.
- The firm and lawyer/paralegal agree that they are not entering into a joint venture and do not have a shared business interest.

Additional Terms to Consider

- The lawyer is currently licensed and in good standing with the Oregon State Bar, has current professional liability coverage, and has no pending malpractice claims or ethics complaints.
- The lawyer does not have a conflict with any of the parties involved in the assigned project.
- The lawyer agrees to at all times fulfill his or her professional duties to protect information that is proprietary, privileged, work product and/or confidential.
- The lawyer will comply with his or her ethical and legal responsibilities as a lawyer licensed to practice law in Oregon.

Additional Contract Terms for Consideration

- The lawyer/paralegal will return or shred all client documents, including all electronic and hard copies of the documents, when the project is complete.
- The lawyer/paralegal will not receive any employee benefits, unemployment compensation or workers' compensation coverage

The Working Relationship

Lawyers/paralegals working as independent contractors should have their own:

- office,
- business cards,
- e-mail account (separate from the law firm's e-mail),
- online research tools,
- computer and copying capability, and
- tax ID number.

Cautions Relating to Contract Lawyers

Contract lawyers/paralegals should not be:

- integrated into the law firm;
- expected to regularly work at the firm; or
- attend firm meetings

because they are not employees of the firm.

Independent Contractors

Independent contractors should:

- set their own rates and fees, make their own determination as to what they will charge to complete a specific project; and at the completion of the project, submit an invoice to the firm for the work performed.
- set their own hours and perform their work without supervision; the law firm should not be exercising control over or closely monitoring how the work is performed.

While the independent contractor and the firm may agree on the specific requirements and deadlines for the assigned project, the firm should not be directly supervising the project.

Lawyers Working as Independent Contractors

- A lawyer/paralegal working as an independent contractor:
 - should be contracting to work for more than one firm;
 - should not be economically dependent on any one firm as a source of business.
- While independent contractors may work regularly with one firm, they must also work with other firms; the working relationship can be frequent but not constant, allowing some intervals when the contract lawyer is not doing work for the firm.
- The firm's financial success should not be dependent on the work of the independent contractor.
- As independent contractors work for several firms, they cannot be subject to non-compete agreements.

Independent Contractors Should Not Be Treated Like Employees

- Independent contractors generally should not be former employees who are performing the same job they had when they worked as an associate or a paralegal in the firm, nor should they be performing the same job duties as employees currently working for the firm.
- As they are not employees, independent contractors cannot be "fired at will." Instead, the terms of the contract determine the consequences if the contract lawyer/paralegal fails to satisfactorily complete the project they contracted to perform according to the contract specifications.

Guidelines for Law Firms Hiring Independent Contractors

Firms wishing to establish an independent contractor relationship with a lawyer, paralegal or other service provider may want to consider the following guidelines:

- **Right to Control** – The firm should provide information necessary for the contract lawyer/paralegal to perform the work assignment, including the date when the work needs to be completed, but should not micromanage the “means and manner of providing the services.”
- **Scheduling** – The contract lawyer/paralegal should be allowed to set his or her own work hours.
- **Location** – To the extent possible, contract lawyers/paralegals should perform the work outside the firm, using their own computer and research tools.

Additional Guidelines for Firms:

- **Compensation** – Payment should be made on a project basis; contract lawyers/paralegals should invoice the firm for the work performed.
- **No Employee-Type Benefits** – The firm should not pay for or provide benefits such as insurance for the contract lawyer/paralegal. The firm should review its employee benefit plan documents and consider an exclusion for workers classified by the firm as non-employees, even if they are later reclassified, even retroactively, as employees.
- **1099 Tax Form** – A Form 1099-MISC (not a Form W-2) should be issued to the independent contractor at end of the year if the payment amount is at least \$600.

Guidelines for Lawyers Working as Independent Contractors

For the contract lawyer, the overall goal is to maintain an “independently established business,” which is the test codified in ORS 670.600 and utilized by the Oregon Department of Revenue. While no single factor is conclusive, contract lawyers/paralegals should consider the following steps to maintain their independent contractor status:

- **Independent Office** – Contract lawyers/paralegals should have their own place of business.
- **Assignments** – Contract lawyers/paralegals should work on a project or assignment basis and invoice firms for the work performed.
- **Diversify** – Contract lawyers/paralegals should strive to work for more than one firm, seeking work through appropriate legal and business publications, speaking engagements, and professional networking opportunities.

Additional Guidelines for Contract Lawyers

- **Business Expenses** – Contract lawyers/paralegals should pay for their own supplies, office expenses, staffing and copying assistance, online research tools, business cards, stationery, and business expenses.
- **Bar and Licensing Requirements** – Contract lawyers/paralegals should pay for their own professional licensing expenses, memberships, fees, CLE requirements, and business licenses.
- **Insurance** – Contract lawyers should maintain legal malpractice insurance.
- **Taxes** – Contract lawyers/paralegals must pay their own income taxes, including estimated taxes, and self-employment taxes; they should request that a Form 1099 be issued reflecting payments for their services

Resources

Federal:

- **Department of Labor: Proposed Rule: Independent Contractor Status under the FLSA, 29 CFR Parts, 780, 788, and 795**
- **Internal Revenue Service:** <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>

Oregon:

- **State Agency Criteria for Independent Contractors Chart:** <https://www.oregon.gov/IC/Documents/State%20Agency%20Criteria%20TABLE.pdf>
- **Department of Revenue / Employment Department / Construction Contractors Board / Landscape Contractors Board:** www.oregon.gov/IC/pages/12-definition.aspx
- **Bureau of Labor and Industries – General:** https://www.oregon.gov/boli/TA/pages/t_faq_independent_contractors_11-2010.aspx
- **Bureau of Labor and Industries – Wage and Hour Division:** https://www.oregon.gov/boli/TA/docs/boli-whd_test_11-2010.pdf
- **Bureau of Labor and Industries – Civil Rights Division:** www.oregon.gov/boli/TA/docs/boli-crd_test-11-2010.pdf
- **Workers' Compensation Division:** www.cbs.state.or.us/wcd/compliance/indcon.html

Independent Legal Advice Recommended

These materials should not be construed as legal advice. Law firms and Contract Lawyers are encouraged to consult with their own legal counsel with respect to specific situations relating to their contracts with lawyers, paralegals or other service providers.



Lisa Brown

Lisa enjoys a close working relationship with her clients. She is passionate about providing quality, cost effective legal services, with a strong focus on risk management.

Lisa's practice includes advising employers and employees on employment matters including harassment, discrimination, retaliation, protected leave, and contracts. Her practice also involves advising health care professionals on business practices and confidentiality issues; advising lawyers in professional negligence matters; as well as reviewing and drafting employment and independent contractor agreements.

Having litigated cases for many years, Lisa enjoys serving as a mediator, arbitrator and facilitator thereby assisting parties in resolving their disputes and helping them to avoid the agony and expense of litigation. Lisa's litigation experience enables her to successfully facilitate internal employment disputes before these internal conflicts escalate into litigation.

Lisa also investigates internal employment complaints relating to harassment, discrimination, retaliation and other employment matters and provides trainings for employers on how to properly conduct internal investigations.

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