

INDEPENDENT CONTRACTORS OR EMPLOYEES?

Law firms, just like any other business, must be sure that the lawyers, paralegals and other individuals providing services to the firm are correctly classified as either independent contractors or employees.

The law firm retaining the worker is responsible for correctly classifying the person as an independent contractor or an employee. If a federal or state agency audit determines that a law firm has misclassified a worker as an independent contractor instead of an employee, the firm may be exposed to considerable potential liabilities, including:

- Unpaid federal and state income and employment taxes;
- Pension and profit sharing, health, life, disability, and other employee benefits;
- Unemployment benefits;
- Failure to provide protected family medical leave;
- Unpaid sick leave;
- Workers compensation claim costs for misclassified workers injured on the job;
- Violation of discrimination laws;
- Wage and hour law violations including unpaid wages, overtime and minimum wage;
- Failure to comply with I-9 requirements;
- Statutory fees and penalties due to misclassification; and
- A host of other employment-related claims.

Agencies and Tests Governing Independent Contractors

Several federal and state agencies audit businesses to determine whether they have correctly classified individuals as independent contractors or employees. Each of the state and federal agencies apply different tests and factors in analyzing whether a person is an employee or independent contractor.

At the federal level, the IRS and the Department of Labor both independently audit employers to evaluate whether workers are correctly classified as independent contractors. In Oregon, some of the state agencies that audit employers for misclassification include the Oregon Department of Revenue, the Oregon Employment Department, the Oregon Bureau of Labor and Industries, the Construction Contractors Board, the Landscape Contractors Board and the Workers' Compensation Division.

The Working Relationship

Independent contractors should have their own business office, business cards, email account (separate from the law firm's email), online research tools, computer and copying capability, and tax ID number. They should not be integrated into the law firm, be expected to regularly work at the firm, or attend firm meetings, because they are not employees of the firm.

Independent contractors 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 an independent contractor and the law firm may agree on the specific requirements and deadlines for the assigned project, the firm should not be supervising the project.

Independent contractors set their own rates and fees, making their own determination as to what they will charge to complete a specific project. At the completion of the project, the independent contractor should submit an invoice to the firm.

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A lawyer or staff person working as an independent contractor should not be economically dependent on any one firm as a source of business. While independent contractors may work regularly with one firm, they also must 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 must be able to work for more than one firm in order to retain their independent contractor status, they cannot be subject to a non-compete agreement.

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 or staff person fails to satisfactorily complete the project they contracted to perform according to the contract specifications.

The Contract

Given the complexity of classification and the risks of incorrect classification, law firms wanting to retain lawyers or staff as independent contractors should consider drafting a written agreement setting forth the factors that legally establish an independent contractor relationship. While there is not a bright-line test for determining whether a lawyer or staff person is an independent contractor or an employee, carefully defining the terms of the relationship in a written contract may reduce the potential risks and liabilities arising out of a misclassification.

Firms wishing to establish an independent contractor relationship with a lawyer, paralegal or other service provider may want to consider the following factors when drafting their contract with the independent contractor:

- **Control Over Work-** The firm will provide the information necessary for independent contractors to perform the assigned projects and will specify when the work must be completed. However, the firm will not micromanage the "means and manner of providing the services" and will not supervise the contractor performing the work. Independent contractors must complete the assigned project by the date agreed to by the parties. Note that if the lawyer does not have malpractice coverage from the Professional Liability Fund, they must be directly supervised by the law firm and therefore, should be classified as an employee and not as an independent contractor.
- **Independent Office-** Independent contractors should have their own place of business, address and phone.
- **Scheduling-** Independent contractors will perform the work on their own schedule, setting their own work hours. Note that if the law firm will require the lawyer to work at the firm during regular business hours, the lawyer may need to be classified as an employee, not an independent contractor.
- **Location-** Independent contractors should primarily perform their work on the assigned project at their own place of business, not at the firm, unless the project requires review of a large volume of documents or the performance of a similar type of project that only can be accomplished at the firm. Note that if the law firm requires the lawyer to work in the firm on a regular basis, the lawyer may need to be classified as an employee, not an independent contractor.

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- **Own Equipment-** Independent contractors must use their own computer, printers, email, research tools and other business equipment. Note that if the lawyer will be using the law firm's equipment, email, online legal research provider, or support staff, the lawyer may need to be classified as an employee, not an independent contractor.
- **Compensation-** Independent contractors will determine their own rate of pay for the project, usually on a project basis, and will invoice the firm for the work performed. Note that if the law firm plans to require the lawyer to complete a time sheet and bill the firm on an hourly basis, rather than allowing the lawyer to set their own fees and submit an invoice, the lawyer may need to be classified as an employee, not an independent contractor.
- **No Employee-Type Benefits-** The firm will not provide any type of employee or insurance benefits for independent contractors.
- **1099 Tax Form-** A Form 1099-MISC (not a Form W-2) should be issued to independent contractors at the end of the year.
- **Independently established business-** Independent contractors must maintain an "independently established business," which is the test codified in ORS 670.600 and utilized by the Oregon Department of Revenue.
- **Diversify-** Independent Contractors should work for more than one firm, seeking work through appropriate legal and business publications, speaking engagements, and professional networking opportunities. Note that if the lawyer is regularly working at the same firm, using one of the firm's offices, and essentially doing the same work as associates or paralegals perform for the firm, the lawyer may need to be classified as an employee, not an independent contractor.
- **Business Expenses-** Independent Contractors 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-** Independent Contractors must maintain their own professional and business licenses as well as pay for their own continuing legal education.
- **Insurance-** Independent Contractors must provide their own legal malpractice insurance and their own business insurance. Note that if the lawyer does not have malpractice insurance and is working as an exempt lawyer, they are required to be directly supervised and should be classified as an employee, not as an independent contractor.
- **Taxes-** Independent Contractors must pay their own income taxes, including estimated taxes, and self-employment taxes; the firm will issue a Form 1099-MISC for the services performed.

Additional Contract Terms to Consider:

- **No Joint Venture-** Independent contractors should agree that they are not entering into a joint venture and do not have a shared business interest with the law firm.
- **Current License-** Independent contractors should confirm that they are currently licensed and in good standing, have current professional liability coverage, and have no pending malpractice claims or ethics complaints.
- **Conflicts-** Independent contractors should confirm they do not have a conflict with any of the parties involved in the assigned project.
- **Proprietary, Privileged, and Confidential Information-** Independent contractors should agree to protect information that is proprietary, privileged, work product, and/or confidential.

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- **Ethics-** Independent contractors should agree to at all times comply with their ethical and legal responsibilities.
- **Client Documents-** Independent contractors should agree to return all client documents to the firm, including all electronic and hard copies of the documents, when the project is complete.
- **No Employee Benefits-** Independent contractors should acknowledge and agree that they are not employees and will not receive any employee benefits, unemployment compensation or workers' compensation coverage.

Although this article describes the basic issues to consider when a law firm wishes to establish an independent contractor relationship with a lawyer, paralegal or other service provider, law firms are encouraged to consult with their own legal counsel when entering into independent contractor relationships and drafting the appropriate contracts in order to lessen the potential liability and damages associated with a misclassification.

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