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# INDEPENDENT CONTRACTOR AGREEMENTS

Presented by GKH Attorneys  
**Jeffrey J. Worley and Jason Asbell**  
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# What is an independent contractor?

“One who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.”

Black’s Law Dictionary, 7<sup>th</sup> Ed. (1999)

# Potential Benefits/Costs of Hiring Independent Contractors

- Potentially reduced liability risk, such as liability to third parties, liability under employment laws
- Potentially lower costs
- BUT, less control
- Risk of misclassification

# Independent Contractor Status

- Depends on each situation
- Courts look to multiple, non-exhaustive factors
- Does NOT depend on what parties call it

# Test to Determine Status

PRIMARY CONSIDERATION = Whether the employer had the right to control the work to be done or the manner in which it is to be performed, regardless of whether the right is actually exercised.

# Factors Considered

- The skill required for job
- Source of the tools/instrumentalities
- Location of the work
- Duration of the relationship
- Whether hiring party can assign additional projects
- Who decides when and how long to work
- Terms of the agreement
- Whether the work is part of the hiring party's regular business
- Who hires/pays assistants
- Provision of employee benefits
- Tax treatment of the hired party
- Who can terminate and when?
- Paid by time or by job

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# Examples of Independent Contractors

Remember, inquiry is fact-intensive – can vary within professions

- Interpreters: Despite receiving training, an evaluation system and a code of ethics, interpreters retained by this company were independent contractors because they determined their own schedules, worked out of their homes, were not reimbursed for expenses, were paid by the job, could decline particular jobs, and could provide interpreter services to other entities, even company's competitors
  - *Language Line Servs. v. Dep't of Gen. Servs.*, 991 A.2d 383 (Pa. Commw. Ct. 2010)



- Paperboy: Where paperboy was permitted to hire his own substitute, could deliver other newspapers along his route, and the newspaper did not control the method by which claimant delivered the papers, paperboy was an independent contractor.
  - *Johnson v. WCAB (Dubois Courier Express)*, 631 A.2d 693 (Pa. Cmwlt 1993).

# Examples of Employees

Remember: Outcomes Will Vary

- Doctor: Doctor who worked for a steel plant as the medical director with the dispensary was an employee because he worked at the plant full-time, was paid a fixed salary, could not engage in private practice, had the same fringe benefits as other supervisory employees, and his hours and number of days worked were controlled by the employer.

– *Babich v. Pavich*, 411 A.2d 218 (Pa. Super. 1979)

- Researchers at automotive glass company: Researchers were employees of entity where employer controlled their day-to-day activities, assigned projects, supervised work, set schedule, provided the employees' exclusive work, employees worked at employer's facility, and employer provided the tools and instrumentalities used

– *Karlo v. Pittsburgh Glass Works, LLC*, 2015 U.S. Dist. LEXIS 117147 (W.D. Pa. 2015)

# Ramifications for Misclassification

- 77 P.S. §501 : criminal prosecutions for failing to obtain workers' compensation coverage for employees. Misdemeanor if unintentional, felony if intentional.
- Civil liability: tort/negligence theories available for workplace injuries (because no workers' compensation coverage); liability to the Pennsylvania Uninsured Employers' Guaranty Fund
- Unreported wages, uncollected Social Security taxes
- Unpaid/uncalculated overtime

# Define the Relationship

- An agreement defines the terms of the relationship...
- ...but saying it is so does not necessarily make it so

# Define the Relationship

- Who are the parties?
- What are the services to be provided?
- Where are the services to be provided?
- When are the services to be provided?  
(the term of the Agreement)

# The Term

How long is the relationship to last?

- Limited by a specific job?
- Limited by length of time?
- Open ended?

# Termination

How can the relationship be terminated?

- What are the terms of payment when the relationship is terminated?
- What are the parties' responsibilities?



# Termination

- There is no indentured servitude in Pennsylvania: A contractor cannot require an independent contractor to perform; however,
- A contractor can be sued for lost profits if a contract is improperly terminated.
- Recommendation: Termination at will of either party, with or without cause

# Define the Relationship

Define that the Independent Contractor is truly independent:

- Controls the time, the manner and the means of the work performed

## Define the Relationship

- Specify that the independent contractor is not:
  - An employee
  - A partner
- Note that neither party has the capacity to legally bind the other

# Ability to Work With Others

- Not an exclusive relationship
  - Either Company or Independent Contractor can work with others
- Exclusive relationship=Employee

# Rate of Compensation

How will the Independent Contractor be compensated?

- Are there penalties for default?

# Indemnification

- To have the Independent Contractor defend and hold the Company harmless for Independent Contractor's negligence; and
- Address workers' compensation

# Taxes and Benefits

- Independent Contractor is not an employee and therefore not entitled to Company benefits
- Independent Contractor is responsible for its own taxes-the Company does not withhold taxes

# Confidentiality and Nondisclosure

- Protect Company trade secrets and intellectual property
- Note Pennsylvania law also specifically protects privately held trade secrets-confidential information



# Confidentiality and Non-disclosure

Violations should be addressed immediately

- Provide notice to Independent Contractor
- Seek injunctive relief as needed
- Damages

# Miscellaneous

- Notice-how do the parties communicate?
- Assignment
- Resolution of dispute-Arbitration or other forms of alternative dispute resolution
- Amendment of agreement/Entirety of agreement/Integration

# Miscellaneous

## Severability:

If any part of the Agreement is not valid or otherwise unenforceable, the remainder of the Agreement remains in full effect

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# QUESTIONS & ANSWERS

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