Best Practices for Retention of Independent Contractors

By: Darren Creasy

The hospitality industry has made effective use of independent contractors in numerous areas including janitorial services, renovations and capital projects, special events, security, and sales/marketing, just to name a few. Misclassification of employees as third-party contractors, however, can give rise to a variety of liabilities and federal and state agencies are budgeting additional funds to target non compliant employers.

A panoply of laws including federal and state anti-discrimination laws, leave of absence laws, wage and hour laws, and laws governing employee benefits and/or the payment of employment taxes distinguish between employees and contractors (often protecting employees but not independent contractors). Nevertheless, employers that fail to take adequate protections occasionally find themselves embroiled in expensive, time-consuming misclassification litigation.

Use of independent contractors should always be an informed and bona fide business decision, not a subterfuge to avoid benefit obligations owed to traditional employees (e.g., provision of employer-funded benefits or payment of employment taxes). Hospitality employers, however, can minimize misclassification litigation exposure through contract strategy, proper training, and forethought. This article provides an overview of proactive steps human resources and legal professionals can take to utilize, both successfully and legally, third party contractors as a staffing management solution.

The independent contractor relationship can be broken down into two separate parts: contract considerations, which typically arise before a contractor ever sets foot on the premises; and worksite considerations, which typically involve the performance of the duties contemplated under the contract. Each will be addressed in turn.

Independent Contractor Contract Considerations

First, the contract should contain a broad indemnification clause to protect the company from contractor negligence, “joint employer” liability, to the extent a joint employment relationship is alleged, or in the event of claims arising out of any injury, disability, or death of the contractors. Second, the contract should require the independent contractor and/or third party contracting agency to maintain a policy of insurance (and specify a minimum amount) to cover any tortious, reckless, negligent acts committed by the contractors or the agency during the performance of any duties. And third, the contract should provide the company with the absolute right to remove and/or replace—at its sole discretion—any contractor for any reason.
The scope of work, duration of the relationship, and each party’s responsibilities should be specifically defined. The contract should provide that the contractors are not agents or employees of the company, and should specify that contractors are either self-employed or employed solely by the contracting agency. The contracting agency should assume sole responsibility for:

- Paying the contractors (including responsibility for employer-provided benefits and payment of employment taxes);
- Providing the contractors with all necessary tools, equipment, supplies, clothing, etc.;
- Assigning the contractors’ job duties;
- Controlling, directing, and supervising the method, details, and means of the contractors’ job duties and performance;
- Determining the need for, and hiring of, additional contractors (at the agency’s own expense);
- Hiring, disciplining, and/or terminating the employment of the contractors;
- Promulgating personnel/HR policies, including EEO and harassment policies; and
- Providing for its own workers’ compensation and unemployment compensation insurance.

The contractor and/or the contracting agency, of course, should be required to comply with all employment laws, and the retention agreement should state that violations are considered grounds for immediate termination of the contract. Before a contract is signed, ask to see the contracting agency’s EEO policies and other personnel/HR policies, check public records for employment-related lawsuits, judgments and/or regulatory actions against the prospective contracting agency, and ask for proof that the agency is timely paying all employment taxes due.

As the relationship evolves and matures, conduct internal audits of third-party contracts to ensure that they properly define, and reflect, the ongoing relationship as well as each party’s responsibilities.

**Independent Contractor Worksite Considerations**
Although the contractors are not agents or employees of the company, written procedures for the supervision of contractors should be promulgated. Company managers should be trained on the issue of joint liability so that they can recognize actions that could lead to misclassification or other forms of legal exposure. The following best practices should be considered in context:

- Avoid having two or more classes of workers—contractors and employees—that essentially perform the same job duties;
- If possible, avoid issuing company-specific material to contractors (e.g., business cards, employee ID badges, facility keys, etc.);
- Do not allow contractors to enroll in company sponsored benefit plans or be paid for company holidays unless holiday time was worked;
- Do not allow contractors to attend company parties or special events;
- Restrict contractors’ participation in project or departmental meetings;
- Prohibit or greatly limit the role of contractors in any hiring, disciplinary action or termination decision; and
- Require contractors to supply their own tools, equipment, supplies, clothing, etc.

Assuming use of an agency, the contractors will be employed by either the agency or by a subcontractor, not the company. Accordingly, contractors should be subject to the personnel. HR policies of the agency, and questions or concerns regarding the same should be directed to agency management, not company management. Furthermore, the contractors’ job duties should be assigned by the agency, not the company, and contractors’ job duties and performance should be managed and supervised by the agency, not the company. While the company should reserve the right to remove and/or replace contractors for any reason, disciplinary actions and termination decisions involving contractors should remain the sole responsibility of the agency, not the company. In order to formalize the separation of powers and responsibilities, a company may wish to consider furnishing space on-site for use by the contracting agency in connection with its management and oversight activities.

To minimize wage and hour exposure, the company may also wish to consider structuring compensation as a fixed fee for work performed, or base contractor compensation on
achievement of certain well-defined goals, as opposed to an hourly basis (i.e., manage for output and results, not specific activities).

Conclusion

Arrangements with third party contractors are drawing increased scrutiny with the growth and proliferation of the contingent workforce. Nevertheless, where proper legal precautions are taken, independent contractors can offer a powerful and effective staffing management solution coupled with minimal exposure. In short, do it right, and you’ll likely get what you bargained for. Do it wrong, however, and you may get a whole lot more (which is not always a good thing).

About the Author

Darren M. Creasy defends employers and management in administrative agency, mediation, and litigation proceedings arising under all federal, state, and local employment laws, provides employment and employee relations counseling and advice, and routinely advises on best practices, litigation avoidance, and defense strategies.