

Hiring the Independent Contractor

Independent contractors can reduce the association's costs for employee-related expenses so long as the worker is truly independent.

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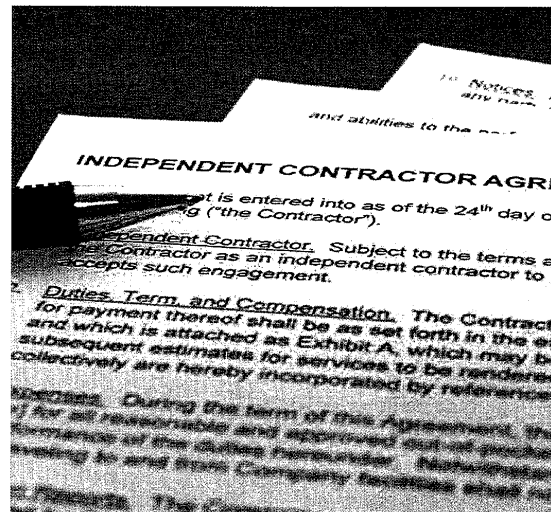
Most association governing documents permit the association's board of directors to enter into contracts for a term of one year or less without member approval, provided the scope is within the board's authority and the association's budget. Independent contractors are often hired in lieu of full-time or part-time association employees to reduce the association's obligation to provide benefits such as insurance, social security, and disability insurance. The issue of determining whether a worker is an "independent contractor" or "employee" can be extremely complex and depends upon numerous factors, including, but not limited to:

- Whether the association has the right to instruct the worker as to how, when, and where he or she is to work. For example if the worker is told when to be at work (i.e. set hours) and how to perform his or her duties, there is a greater likelihood that the worker is an employee.
- Whether the worker is required to participate in association training or attend association meetings.
- Whether the worker hires and pays his or her own assistants.
- Whether the worker furnishes his or her own supplies and tools of the trade for the tasks to be performed.
- Whether the worker performs similar tasks for other companies or entities.

Prior to hiring an independent contractor, the association should ensure that the independent contractor is licensed, if applicable, in the trade for

which they are being hired. Licensing information can be located on the California Contractor State Licensing Board website at www.cslb.ca.gov. Associations should be advised of the dangers of hiring an Independent Contractor who can, for example, be an unlicensed contractor who fails to maintain general liability or workers compensation insurance (see *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App 4th 724). In such a situation, if a worker is injured while working on association property, or if there is property damage resulting from the work, the court of appeal has held that the association, its managing agent, and/or its insurance company may be liable for such personal injury or property damage. Additionally, the association's insurance policies may have limits or even specific exclusions for the association's coverage when utilizing an unlicensed contractor.

The association should require independent contractors to comply with federal statutes pertaining to the hiring of documented workers such as 8 United States Code section 1324(a), which makes it illegal to knowingly hire an undocumented worker. If the association knows or has reason to know that an independent contractor has hired and/or is utilizing the employment services of an illegal alien, the association may be subject to civil fines of not less than \$250 and no more than \$2,000 for the first violation. In order to comply with the federal statute, the association should request the



independent contractor's Form I-9 employment eligibility verification documentation to avoid any potential penalties.

If an association enters into a contract with an independent contractor the board should seek legal counsel before signing the contract.

Boards should exercise caution when categorizing a worker as an independent contractor, as the designation rests heavily on how the association treats the independent contractor. A written contract purporting to establish an "independent contractor" relationship, by itself, does not necessarily establish that an independent contractor relationship exists. For example, if the independent contractor has no control over when and how services are performed, the association will likely be deemed an employer, even if the parties' intentions are to the contrary. The independent contractor should agree to indemnify, defend and hold harmless the association for any damage,

claims or injury arising from work performed by the independent contractor. The indemnification clause can protect the association by forcing the independent contractor's insurance company to indemnify and provide a defense on behalf of the association. This indemnity is the reverse of what the association must provide for its employees.

Recommendations

When contemplating whether to hire independent contractors, boards should consider an individual or company's license status, reputation, and reasonableness of cost and contract terms. Saving money on the front end may result in liability on the back end. Association legal counsel is a valuable resource and can assist boards in determining whether the worker is an employee or an independent contractor. Additional information can be found on the website for the California Department of Industrial Relations at www.dir.ca.gov.