

Worker Classification Overview

This document contains a substantive introduction into worker classification, consisting of a primer on independent contractors, a checklist for drafting an independent contractor agreement, and a model independent contractor agreement.

The independent contractor-versus-employee primer seeks to give you a broad overview on worker classification. The primer is non-exhaustive, meaning that it does not provide all available information on worker classification.

Where the primer speaks to state law concerning worker classification, it focuses on Pennsylvania law. Although the law is uniform on federal matters, you should keep in mind that the law in your state may vary from the law in Pennsylvania.

The primer touches on:

- the definition of an independent contractor generally;
- the definition of an independent contractor in Pennsylvania;
- the definition of an employee;
- the benefits of designating workers as independent contractors;
- the different laws that may be applicable to independent contractors;
- some of the consequences of misclassification generally;
- some of the tests for independent contractor status;
- the consequences of misclassification in Pennsylvania; and
- some methods through which businesses can reduce the consequences of misclassifying workers.

Like the primer, the checklist for drafting an independent contractor agreement is non-exhaustive. Many of the “do’s and don’ts” of the checklist are guidelines, and generally no one guideline will make or break your independent contractor agreement. Creating an independent contractor agreement suited to your business might involve balancing some important factors.

The guidelines of the checklist create a strongly pro-business independent contractor agreement. However, such an agreement might not correspond with your goals.

The final document is a model independent contractor agreement (with annotations) which follows all of the guidelines set by the checklist. This model agreement is not intended to replace an agreement drafted specifically

for your business by a legal professional; it simply represents one version of a strongly pro-business independent contractor agreement. The agreement's annotations identify areas that you can modify to suit your business needs.

Disclaimer

These documents were created and vetted by students and supervising attorneys at the University of Pennsylvania Law School's Entrepreneurship Legal Clinic applying Pennsylvania law. They are intended to educate and inform the early stage start-up. As such, they are designed to be simple and accessible and may omit terms or language relevant to your specific circumstances. Please carefully read through the documents and any instructions and annotations included therein.

You acknowledge that your use of these documents does not create an attorney-client relationship between you and the Clinic or you and the individual members of the Clinic and does not constitute the provision of legal advice or other professional advice. You should seek advice from a licensed attorney before using or relying on these documents. Additionally, none of the documents created constitute tax advice. By using and relying on these documents, you assume all risk and liability that may result.

Independent Contractors vs. Employees

What Is An Independent Contractor?

In the most basic sense, an independent contractor is a worker who agrees to work for individuals or businesses in exchange for compensation while retaining control over the methods and processes through which he does the work.

Typically, an independent contractor:

- retains control over the method and manner of the work;
- charges a fee for the service;
- is hired to complete discrete tasks or projects in which he has a particular skill;
- is responsible for paying his own Social Security, Medicare, and income taxes;
- is hired for a specified, limited period of time;
- is economically independent and assumes the costs associated with completing the work; and
- provides, necessary equipment, tools, or skills for the job.

In Pennsylvania

There is no single established definition of an independent contractor in Pennsylvania common law. Instead, a variety of tests exists to determine whether a worker is an independent contractor for the purposes of:

- common law;
- unemployment insurance;
- workers' compensation; and
- wage and hour laws.

What is an Employee?

As opposed to an independent contractor, an employee is a worker that is subject to the control and oversight of their employer. Other characteristics of an employee include:

- being employed for a continuous period of time;
- being economically dependent on the employer; and
- being protected by federal, state, and local employment laws.

Because employees are subject to control over the method and manner of their work, the business in turn owes them some responsibilities. Businesses are required to:

- pay the associated Social Security, Medicare, and income taxes of an employee;
- pay the employee wages (including any overtime wages) and any employer-sponsored benefits; and
- provide the employee with a W-2 showing the amount of wages withheld from their pay.

Benefits of Independent Contractor Classification

Hiring independent contractors instead of employees can provide various benefits to businesses, include:

- no obligation to pay income, Social Security, and Medicare taxes;
- no obligation to comply with the Fair Labor Standards Act (FLSA) or any state wage and hour laws (including minimum wage and overtime requirements);
- no obligation to provide any benefits, such as healthcare, paid time off, or any other common benefits;
- no insurance obligations, such as worker's compensation or unemployment insurance; and
- no obligations under many state and local employment laws, including health and safety laws and anti-discrimination laws.

Governing Bodies

This primer will address independent contractor status as it relates to the Internal Revenue Service (IRS), the Department of Labor (DOL), and Pennsylvania state law. It is important to know which independent contractor test applies because it can change depending on what a business is trying to accomplish.

For example, if the Company is trying to determine whether to withhold or pay taxes on compensation, it looks to the definitions set forth by the IRS. If the business is concerned with appropriate payment of wages or benefits, it looks to the FLSA. And finally, if the business is concerned with tort liability, it looks at its state's common law.

Consequences of Misclassification

With so many associated benefits, businesses are often eager to classify their workers as independent contractors. But correctly classifying a worker as an independent contractor is essential for any business. The IRS, the DOL, and

state government agencies and courts tend to construe independent contractor status narrowly and impose large penalties for misclassification so as to ensure that businesses are not improperly classifying their employees as independent contractors.

If a business classifies an employee as an independent contractor with no reasonable basis, consequences include:

- reimbursing employee for wages that the business should have paid them under the FLSA, including overtime and minimum wage;
- paying back-taxes and penalties for federal and state income taxes, Social Security, Medicare, and unemployment;
- paying any workers' compensation benefits and disability payments;
- providing employee benefits, including health insurance, retirement benefits, stock options, etc.;
- liquidated damages; and
- civil monetary penalties.

Tests for Independent Contractor Status

1 Tests Under Federal Law

A worker does not become an independent contractor just because a business says that he is one. Even if a business classifies a worker as an independent contractor, the worker is an independent contractor only if he satisfies the test for independent contractor status. It is the relationship that matters, not the designation.

The unifying factor of all independent contractor tests is the control relationship between the worker and the business. The less control a business exerts over a worker, the more likely he is to be an independent contractor.

The IRS bases its classification on three factors: (1) the degree of behavioral control over the worker; (2) the degree of financial control over the worker; and (3) the type of relationship between the parties.

Behavioral Control depends on the instructions that the business gives to the worker. An employee is generally subject to a business's instructions on when, where, and how to work. Examples of types of instructions given to employees include:

- when and where to work;
- what tools and equipment to use;

- what workers to hire and to assist with the work;
- what work must be performed by a specified individual;
- what order or sequence to follow in doing the work; and
- the training the business gives to the worker. Any employee must be trained to perform services in a particular manner. An independent contractor generally uses their own methods. Even if no instructions are given, behavioral control may exist if the employer has the right to control how the work results are achieved.

Financial Control depends on:

- The extent to which the worker has unreimbursed business expenses. Independent contractors are more likely to have unreimbursed expenses.
- The extent of the worker's investment. Independent contractors often have significant investment in the tools they use to perform the work.
- The extent to which the worker makes her services available to the relevant market. Independent contractors are generally free to seek out other business opportunities.
- How the business pays the worker. An employee is guaranteed a wage for hourly, weekly, or other time periods of work, and an independent contractor is generally paid a flat fee or on a time/materials basis for the job performed. However, in some professions (such as law), it is common to pay independent contractors hourly.
- The extent to which the worker can realize profit or loss. An independent contractor can make a profit or a loss, but an employee must be paid their wages in all circumstances.

The Type of Relationship between the Parties is illustrated by:

- Written contracts describing the relationship the parties intended to create. These demonstrate whether or not the business provides the worker with employee-type benefits such as insurance, a pension plan, or sick pay.
- The permanency of a relationship. This can support the expectation that the relationship will continue indefinitely and usually indicates an employer-employee relationship.
- The extent to which the services performed by the worker are a key aspect of the regular business of the company. If the worker provides services that are a key aspect of the regular business of the company, this indicates an employer-employee relationship.

Other commonly used independent contractor tests include:

- The common law Darden Test, which is regularly used in the context of Title VII, the Americans with Disabilities Act (ADA), the Age

Discrimination Employment Act (ADEA), and the Employee Retirement Income Security Act (ERISA). The twelve factors considered under the Darden test are:

1. the contractor's right to control when, where, and how the individual performs the job;
 2. the skill required for the job;
 3. the source of the instrumentalities and tools of the job;
 4. the location of work;
 5. the duration of the relationship between the parties;
 6. whether the contractor has the right to assign additional projects to the individual;
 7. the extent of the individual's discretion over when and how long to work;
 8. the method of payment;
 9. the contractor's role in hiring and paying assistants;
 10. whether the individual's work is part of the regular business of the contractor;
 11. whether the contractor is in business; and
 12. the provision of employee benefits to the individual.
- The economic realities test, which is used by the FLSA and generally focuses on five factors:
 1. the degree of control exerted by the alleged employer over the worker;
 2. the worker's opportunity for profit or loss;
 3. the worker's investment in the business;
 4. the permanence of the working relationship; and
 5. the degree of skill required to perform the work.
 - A 20-factor common-law test, which the IRS no longer uses.

In each of these tests, no single factor is dispositive. Instead, courts and government agencies balance the factors and give certain items more or less weight, depending on the relevant industry.

2 Tests Under Pennsylvania Law

Common Law. In Pennsylvania, the most important factors of an independent contractor classification are that:

- the independent contractor controls the method and manner in which the work is done; but
- the business controls the result of the work.

Pennsylvania courts have stated that they consider the following factors when determining independent contractor classification:

- control of the manner in which work is to be done;
- responsibility for result only;
- terms of agreement between the parties;
- the nature of the work or occupation;
- skill required for performance of the work;
- whether one employee is engaged in a distinct occupation or business;
- which party supplies the tools;
- whether payment is by the time or by the job;
- whether work is part of the regular business of the alleged employer;
- and
- whether the alleged employer can terminate the employment at any time.

Workers' Compensation. Under Pennsylvania's Workers' Compensation Act, the courts generally follow the common law control test.

Pennsylvania Unemployment Compensation. To be considered an independent contractor under Pennsylvania Unemployment Compensation, or UC law, a worker must meet the following two conditions:

- The worker has been and will continue to be free from control or direction over the performance of the services involved, both under his contract of service and in fact; and
- As to these services, the worker is customarily engaged in an independently established trade, occupation, profession or business.

Unless these two conditions are met, the worker will be considered an employee and subject to UC law.

Construction Workplace Misclassification Act. If the worker performs services in the construction industry, he will be designated an independent contractor only if he:

- has a written contract to perform such services;
- is free from direction or control over performance of the services both under the contract of service and in fact; and
- is customarily engaged in an independently established trade, occupation, profession or business.

To be customarily engaged in an independently established trade, occupation, profession or business, the worker must:

- possess the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed;
- realize a profit or suffer a loss as a result of performing the services;
- perform the services through a business in which the individual has a proprietary interest;
- maintain a business location that is separate from the location of the person for whom the services are being performed;
- have previously performed the same or similar services for another person while free from direction or control over performance of the services both under the contract of service and in fact, or hold himself out to another person as available and able to perform the same or similar services while free from direction or control over performance of the services; and
- maintain liability insurance during the contract term of at least \$50,000.

If an employee is misclassified under this Act, he will be reclassified for unemployment, workers' compensation, and wage and hour law purposes. Moreover, the business that misclassified him may face civil and criminal penalties.

***Note:** Situations can occur in which a worker is deemed to be an independent contractor under one law but not another. This can lead to prosecution for the business under one law and not another. Businesses should carefully craft their independent contractor relationships so as to meet the independent contractor threshold under all tests.

Consequences of Misclassification in Pennsylvania

Pennsylvania Unemployment Compensation. The Pennsylvania Department of Labor and Industry (PDLI) can impose civil and criminal penalties for willful violations.

Workers' Compensation. The PDLI can impose criminal misdemeanor charges for violations and impose felony charges if the violation was intentional. It also pursues reimbursement for costs due to the business's failure to insure its employees.

Wage and Hour Laws. Possible penalties for misclassification under Pennsylvania wage and hour laws include:

- having to back-pay unpaid wages;
- any Costs;

- any attorneys' fees; and
- criminal misdemeanor charges, where conviction can result in a fine, imprisonment, or both.

Additionally, if a business intentionally misclassifies the worker, the PDLI can assess liquidated damages of the greater of \$500 or 25% of the amount that is owed to the employee. If a business and a worker have a good faith dispute over the classification, then the worker can file suit against the employer to recover wages, costs, and attorney's fees.

Construction Workplace Misclassification Act. Each misclassification under this Act is considered a separate violation. Penalties for violating the Act include:

- civil penalties;
- a stop-work order for the misclassified worker, which requires that he stop working within 24 hours; and
- criminal penalties for intentional violation.

Mitigating Tax Consequences of Misclassification

Section 530 Safe Harbor. Section 530 of the Revenue Act of 1978 states that a worker will not be considered an employee if a taxpayer:

- treated him and other workers performing similar tasks as nonemployees for all periods;
- had a reasonable basis for treating him as a nonemployee; and
- filed required information and other returns (such as Form 1099-MISC) consistently with that status.

A taxpayer is deemed to have had a reasonable basis for not treating an individual as an employee if the taxpayer reasonably relies on:

- judicial precedent, published rulings, or technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;
- a past IRS audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or
- long-standing recognized practice of a significant segment of the industry in which the individual was engaged.

Voluntary Classification Settlement Program. In September 2011, the IRS announced a new voluntary classification settlement program (VCSP)

providing partial relief from retroactive federal employment tax assessments for eligible taxpayers. To participate in the VCSP, employers must:

- submit an application;
- agree to prospectively treat their workers or a class or group of workers as employees for federal employment tax purposes in future tax periods; and
- agree to extend the period of limitation on assessment of employment taxes for an additional three years for each of the three calendar years beginning after the date of the agreement.

In return:

- Employers will pay only 10% of the employment tax liability otherwise due for the most recent tax year, not subject to interest or penalties.
- The IRS will not conduct an employment tax audit with respect to the employer's worker classification for prior years.
- The employment tax liability of the most recent year is determined under the rates of IRC Section 3509 (under which businesses are eligible to pay smaller income tax withholdings).

To be eligible for the program, employers must:

- not currently be under audit by the IRS, the DOL, or a state agency concerning worker classification;
- must have complied with the results of any previous audit of worker classification; and
- must have consistently treated workers as nonemployees, for whom they must have filed all required Forms 1099 for the previous three years.

Checklist: Independent Contractor Agreement

This checklist sets out the dos and don'ts for drafting an Independent Contractor Agreement. The default agreement set out by the following list is strongly pro-Company. When drafting an actual agreement, you must take into account the relative bargaining power of the two parties, their respective needs, and their risk tolerance.

Services

- Don't:** Control the method and manner of accomplishing the service, but only the end result.
- Don't:** Make an independent contractor comply with Company policies.
- Do:** Have the independent contractor furnish their own equipment. To the extent that an independent contractor must use the Company's facilities or equipment, they can be required to follow Company policy.

Term

- Don't:** Have an indefinite term that can be terminated at any time for any or no reason.
- Do:** Have a fixed term or project for which to hire an independent contractor.

Fees and Expenses

- Don't:** Pay an independent contractor a salary or any benefits.
- Don't:** Pay an independent contractor on an hourly, weekly, or monthly basis (although payment by the hour may be customary for some industries).
- Don't:** Pay for an independent contractor's expenses or overhead.
- Do:** Pay an independent contractor on a fixed fee basis.

Relationships Among the Parties

- Don't:** Pay any benefits, such as healthcare, disability, life insurance, stock options, vacation plans, retirement plans, etc.
- Don't:** Withhold any income, payroll, Social Security, Medicare, or any other federal, state, or local taxes.
- Do:** State that the Company will not be responsible for any person employed by the independent contractor in the performance of his services.
- Do:** Hold the independent contractor responsible for paying his own taxes.

Intellectual Property Rights

- Don't:** Allow the independent contractor to retain any IP rights unless the property is in preexisting tools or materials that may be incorporated into the deliverables.
- Do:** Have the independent contractor assign all IP rights that default to him over to the Company (e.g., if the service results in an invention that can be patented).

Confidentiality

- Don't:** Have a broad confidentiality provision in the agreement. The IRS, DOL, and state courts view such provisions as being indications of employer-employee relationships.
- Do:** Narrowly customize the confidentiality provision to your Company's facts and circumstances.

Representations and Warranties

- Don't:** Make more representations and warranties than are necessary.
- Do:** Ensure that the independent contractor:
- has the right to enter into the agreement;
 - does not have a conflict that should prevent him from entering into the agreement;
 - has the skill to perform the work specified in the agreement; and
 - will not violate any laws in the performance of the agreement.

Liability

- Don't:** Have a low contractual cap on liability. A low cap cannot serve as incentive to make sure that independent contractors comply with their contractual obligations.
- Do:** Include an indemnification provision for:
- the death or injury of the independent contractor;
 - any property damage caused by the independent contractor; and
 - any breaches in representations and warranties by the independent contractor.
- Do:** Consider having the independent contractor obtain liability insurance.

Insurance

- Don't:** Allow independent contractors to work without liability insurance.
- Do:** Ensure that you identify and meet the statutory requirements for liability insurance that are present in some industries (such as the construction industry).

Other Business Activities

Don't: Restrict an independent contractor's right to take on other work.

Do: Consider adding a provision that prevents independent contractors from taking on work that impacts their ability to perform the work required by the contract.

Assignment

Don't: Allow an independent contractor to assign the contract to another worker.

Do: If the Company does allow the independent contractor to subcontract, make sure that the subcontractor is required to enter into a written agreement that carries the same obligations as the independent contractor agreement.

Termination

Don't: For a strongly pro-Company agreement, don't give the independent contractor the right to terminate. Exceptions can be made for the Company's material, uncured breach.

Do: Set out the independent contractor's obligations upon termination.

Independent Contractor Agreement

This agreement (this “Agreement”) sets forth the terms and conditions whereby you (the “Contractor”) agree to provide certain services (as described on Schedule 1) to [Name of Client Company], with offices located at [Address], a [State of Organization] [Type of Entity] (the “Company”).

1 Services

1.1 Agreement for Services. The Company hereby engages Contractor, and Contractor hereby accepts such engagement, as an independent contractor to provide certain services to the Company on the terms and conditions set forth in this Agreement.

1.2 Schedule. Contractor will provide to the Company the services set forth on Schedule 1 (the “Services”). Contractor will perform such Services in a diligent and workmanlike manner and in accordance with the schedule, if any, set forth in **Schedule 1.**¹

1.3 Control. The Company will not control the manner or means by which Contractor performs the Services, including but not limited to the time and place Contractor performs the Services. However, the company may control the end result of the Services.

1.4 Equipment. Unless otherwise set forth in Schedule 1, Contractor will furnish, at its own expense, the equipment, supplies and other materials used to perform the Services. [The Company will provide Contractor with access to its premises and equipment to the extent necessary for the performance of the **Services.**]²

1.5 Premises. To the extent Contractor performs any Services on the Company’s premises or using the Company’s equipment, Contractor will comply with all applicable policies of the Company relating to business and office conduct, health and safety and use of the Company’s facilities, supplies, information technology, equipment, networks and other **resources.**³

2 Term

The term of this Agreement will commence on [[Date] and will continue [for a period of [days/weeks/months] or until [Date] or until the [Services/[Project Name] is/are **completed**],⁴ unless terminated earlier in accordance with Clause 10 (the “Term”). Any extension of the term will be subject to mutual written agreement between the parties.

3 Fees and Expenses

3.1 Service Fees. As full compensation for the Services and the rights granted to the Company in this Agreement, the Company will pay Contractor a fixed fee of \$[Amount] (the “Fees”), payable on [completion of the Services to the Company’s satisfaction/the dates/achievement of the milestones]. Contractor acknowledges that it will receive an IRS Form 1099-MISC from the Company, and that it will be solely responsible for all federal, state and local taxes, as set out in **Clause 4.2.⁵**

OR⁶

As full compensation for the Services and the rights granted to the Company in this Agreement, the Company will pay Contractor \$[Amount] per hour for the term of the Agreement. Contractor will submit an invoice to the Company on a weekly basis indicating the number of hours worked that week.

3.2 Other Costs and Expenses. Contractor is solely responsible for any travel or other costs or expenses incurred by it in connection with the performance of the Services, and in no event will the Company reimburse Contractor for any such costs or **expenses.⁷**

OR

The Company agrees to reimburse Contractor for all reasonable and documented travel and other costs or **expenses⁸** incurred or paid by it in connection with the performance of the Services in accordance with the general reimbursement policy of the Company. Expenses will never exceed \$[Amount] in the aggregate in any given weekly period. All expenses must be approved in writing in advance by the Company.

4 Relationship of the Parties

4.1 Contractor Independence. Contractor is an independent contractor of the Company, and this Agreement will not be construed to create any association, partnership, joint venture, employee or agency relationship between Contractor and the Company for any purpose. Contractor has no authority (and will not hold itself out as having authority) to bind the Company and it will not make any agreements or representations on the Company’s behalf without the Company’s prior written **consent.⁹**

4.2 No Employee Benefits. Without limiting Clause 4.1, Contractor will not be eligible to participate in any vacation, group medical or life insurance, disability, profit sharing or retirement benefits or any other fringe benefits or benefit plans offered by the Company to its

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employees, and the Company will not be responsible for withholding or paying any income, payroll, Social Security or other federal, state or local taxes, making any insurance contributions, including unemployment or disability, or obtaining worker's compensation insurance on the Contractor's behalf. Contractor will be responsible for, and will indemnify the Company against, all such taxes or contributions, including penalties and interest. Any persons employed or engaged by Contractor in connection with the performance of the Services will be considered employees or independent contractors of the Contractor and Contractor will be fully responsible for them and indemnify the Company against any claims made by or on behalf of any such employee or contractors.

5 Intellectual Property Rights

5.1 Ownership of Rights. The Services have been specially ordered and commissioned by Company. To the extent the Services include materials subject to copyright, patent, trademarks, trade secrets, and other intellectual property rights (collectively "Intellectual Property Rights"), Contractor agrees that the Services are done as "work made for hire" as that term is defined in 17 U.S.C. § 101, and that as a result, Company will own all Intellectual Property Rights in the Services. If, for any reason, any of the Deliverables ("Deliverables") do not constitute a "work made for hire," Contractor hereby irrevocably assigns to the Company, in each case without additional consideration, all right, title and interest throughout the world in and to the Deliverables, including all Intellectual Property Rights therein.

5.2 Moral Rights. Any assignment of copyrights under this Agreement includes all rights of paternity, integrity, disclosure and withdrawal and any other rights that may be known as "moral rights" (collectively, "Moral Rights"). Contractor hereby irrevocably waives, to the extent permitted by applicable law, any and all claims it may now or hereafter have in any jurisdiction to any Moral Rights with respect to the Deliverables.¹⁰

5.3 Disclosures. Contractor will make full and prompt disclosure to the Company of any inventions or processes, as such terms are defined in 35 U.S.C. § 100 (the "Patent Act"), made or conceived by Contractor alone or with others during the Term, whether or not such inventions or processes are patentable or protected as trade secrets and whether or not such inventions or processes are made or conceived during normal working hours or on the premises of the Company. Contractor will not disclose to any third party the nature

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or details of any such inventions or processes without the prior written consent of the Company.

5.4 Power of Attorney. Upon the request of the Company, Contractor will promptly take such further actions, including execution and delivery of all appropriate instruments of conveyance, as may be necessary to assist the Company to prosecute, register, perfect, record or enforce its rights in any Deliverables. In the event the Company is unable, after reasonable effort, to obtain Contractor's signature on any such documents, Contractor hereby irrevocably designates and appoints the Company as its agent and attorney-in-fact, to act for and on its behalf solely to execute and file any such application or other document and do all other lawfully permitted acts to further the prosecution and issuance of patents, copyrights or other intellectual property protected related to the Deliverables with the same legal force and effect as if Contractor had executed them. Contractor agrees that this power of attorney is coupled with an interest.

5.5 Pre-existing Materials. Notwithstanding Clause 5.1, to the extent that any of Contractor's pre-existing materials are contained in the Deliverables, Contractor retains ownership of such preexisting materials and hereby grants to the Company an irrevocable, worldwide, unlimited, royalty-free license to use, publish, reproduce, display, distribute copies of, and prepare derivative works based upon, such preexisting materials and derivative works thereof. The Company may assign, transfer and sublicense such rights to others without Contractor's approval.

5.6 No License. Except for such pre-existing materials, Contractor has no right or license to use, publish, reproduce, prepare derivative works based upon, distribute, perform, or display any Deliverables. Contractor has no right or license to use the Company's trademarks, service marks, trade names, trade names, logos, symbols or brand names.

5.7 Contractor's Employees. Contractor will require each of its employees and contractors to execute written agreements securing for the Company the rights provided for in this Clause 5 prior to such employee or contractor providing any Services under this Agreement.

6 Confidentiality¹¹

6.1 Confidential Information. Contractor acknowledges that it will have access to information that is treated as confidential and

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proprietary by the Company, including, but not limited to, trade secrets, technology, information pertaining to business operations and strategies, customers, pricing, marketing, finances, or personnel. In each case, Contractor will not divulge this information in any way, whether spoken, written, printed, electronic or in any other form or medium (collectively, the “Confidential Information”) without the prior written consent of the Company. Any Confidential Information that Contractor develops in connection with the Services, including, but not limited to, any Deliverables, will be subject to the terms and conditions of this section. Contractor will notify the Company immediately in the event it becomes aware of any loss or disclosure of any Confidential Information.

6.2 Legal Disclosures. Nothing herein will be construed to prevent disclosure of Confidential Information as may be required by applicable law or regulation, or pursuant to the valid order of a court of competent jurisdiction or an authorized government agency, provided that the disclosure does not exceed the extent of disclosure required by such law, regulation or order. Contractor agrees to provide written notice of any such order to an authorized officer of the Company within [number of days] of receiving such order, but in any event sufficiently in advance of making any disclosure to permit the Company to contest the order or seek confidentiality protections, as determined in the Company’s sole discretion.

7 Representations and Warranties

7.1 Contractor’s Representations. Contractor represents and warrants to the Company that:

- (A) Contractor has the right to enter into this Agreement, to grant the rights granted herein and to perform fully all of its obligations in this Agreement;
- (B) Contractor enters into this Agreement with the Company and its performance of the Services do not and will not conflict with or result in any breach or default under any other agreement to which Contractor is subject;
- (C) Contractor will perform the Services in compliance with all applicable federal, state and local laws and regulations;
- (D) the Company will receive good and valid title to all Deliverables, free and clear of all encumbrances and liens of any kind; and

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(E) all Deliverables are and will be Contractor's original work (except for material in the public domain or provided by the Company) and, to the best of Contractor's knowledge, does not and will not violate or infringe upon the intellectual property right or any other right whatsoever of any person, firm, corporation, or other entity.

7.2 Company's Representations. The Company hereby represents and warrants to Contractor that Company has the full right, power and authority to enter into this Agreement and to perform its obligations hereunder; and the execution of this Agreement by Company's representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action.

8 Indemnification

8.1 Company's Indemnity. Contractor will defend, indemnify and hold harmless the Company, its affiliates and its officers, directors, employees, agents, successors and assigns from and against all losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fines, costs or expenses of whatever kind (including reasonable attorneys' fees) arising out of or resulting from:

(A) bodily injury, death of any person or damage to real or tangible, personal property resulting from Contractor's acts or omissions; and

(B) Contractor's breach of any representation, warranty or obligation under this Agreement.

8.2 Satisfaction. The Company may satisfy such indemnity (in whole or in part) by way of deduction from any payment due to Contractor.

9 Insurance

During the Term, Contractor will maintain in force adequate workers' compensation, commercial general liability, errors and omissions, and other forms of insurance, in each case with insurers reasonably acceptable to the Company, with policy limits sufficient to protect and indemnify the Company and its affiliates, and each of their officers, directors, agents, employees, subsidiaries, partners, members, controlling persons, and successors and assigns, from any losses resulting from Contractor or its agents, contractors, servants or employees conduct, acts, or omissions. The Company will be listed as additional insured under such policy, and Contractor will forward a certificate of insurance

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verifying such insurance upon the Company's written request, which certificate will indicate that such insurance policies may not be canceled before the expiration of a 30 day notification period and that the Company will be immediately notified in writing of any such notice of termination.¹²

10 Termination

10.1 Company's Right to Terminate. The Company may terminate this Agreement without cause upon seven days' written notice to Contractor. In the event of termination pursuant to this section, the Company will pay Contractor on a pro-rata basis any Fees then due and payable for any Services completed up to and including the date of such termination. The Company may terminate this Agreement, effective immediately upon written notice to Contractor, in the event that Contractor materially breaches this Agreement.

10.2 Contractor's Duties. Upon expiration or termination of this Agreement for any reason, or at any other time upon the Company's written request, Contractor will, within seven days after such expiration or termination:

- (A) deliver to the Company all Deliverables (whether complete or incomplete) and all hardware, software, tools, equipment or other materials provided for Contractor's use by the Company;
- (B) deliver to the Company all tangible documents and materials containing, reflecting, incorporating or based on the Confidential Information;
- (C) permanently erase all of the Confidential Information from Contractor's computer systems; and
- (D) certify in writing to the Company that Contractor has complied with the requirements of this section.

10.3 Survival. The terms and conditions of this section and Clause 4, Clause 5, Clause 6, Clause 7, Clause 8, Clause 12, Clause 12 and Clause 13 will survive the expiration or termination of this Agreement.

11 Other Business Activities

Contractor may be engaged or employed in any other business, trade, profession or other activity which does not place it in a conflict of interest

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with the Company. Contractor will not be engaged in any business activities that do or may compete with the business of the Company or perform any services for direct competitors of the Company without the Company's prior written consent, to be given or withheld in the Company's sole discretion.¹³

12 Assignment

Contractor will not assign any rights, or delegate or subcontract any obligations, under this Agreement without the Company's prior written consent. Any assignment in violation of the foregoing will be deemed null and void. The Company may freely assign its rights and obligations under this Agreement at any time.

13 Miscellaneous

13.1 Notices. All notices, requests, consents, claims, demands, waivers and other communications hereunder (each, a "Notice") will be in writing and addressed to the parties at the addresses set forth in this Agreement. All Notices will be delivered by a nationally recognized overnight courier (with all fees pre-paid) and via e-mail of a PDF document. Except as otherwise provided in this Agreement, a Notice is effective only if the party giving the Notice has complied with the requirements of this section.

13.2 Entire Agreement. This Agreement constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter. This Agreement may be amended, modified, or supplemented only by an agreement in writing signed by each party.

13.3 Governing Law. This Agreement will be governed by and construed in accordance with the internal laws of the Commonwealth of Pennsylvania without giving effect to any choice or conflict of law provision or rule. Each party irrevocably submits to the exclusive jurisdiction and venue of the federal and state courts located in the Philadelphia County of Pennsylvania in any legal suit, action or proceeding arising out of or based upon this Agreement or the Services provided hereunder.¹⁴

13.4 Severability. If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability will not affect any other term or

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provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

Contractor has read this agreement carefully and understands its terms.

Contractor

Company

By: _____

Print Name

Its: _____

Contractor's Signature

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**Schedule 1
Description of Services**

Independent Contractor Agreement between Company [Company], a Pennsylvania corporation (“**Company**”), and _____ (“**Contractor**”) dated as of _____, _____.

Services to be provided by Contractor:

Additional Services may be added by parties by mutual agreement in writing.

Term of Agreement: Completion of Services

Work product to be delivered by Contractor (Check boxes as applicable and set forth details as desired in space provided):

- Oral recommendations/reports
- Written reports
 - Daily
 - Weekly
 - Monthly
 - Upon Completion
 - Other:
- Software
 - Source code
 - Object code
- Diagrams, drawings, schematics, etc.
- Notes, Drafts, Working Papers, etc.

Schedule for Completion of Services:

Confidential Information (as defined in Section 6.1 of the above agreement) may be utilized:

- Only at Company's business premises.
- At Contractor's business premises provided that appropriate confidentiality procedures and arrangements are observed.
- Other:

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¹ This Agreement states that the Independent Contractor is working on a single project for the entrepreneur. If the entrepreneur wants an agreement covering two or more projects with the Independent Contractor, Clause 1.2 should be edited to allow for periodic revision allowing the entrepreneur to add additional assignments for the Independent Contractor upon mutual agreement of the parties. One agreement covering multiple assignments between the parties could be evidence of an employee relationship.

² This can be added if necessary. However, it can be a factor indicative of an employer/employee relationship.

³ Obviously, 1.5 is a requirement only if the highlighted portion of 1.4 is included in the agreement. Companies must also be careful with provisions like 1.5 because this provision exerts control over the Contractor's work. This factor weighs in favor of classification as an employee.

⁴ It is important to include an end point to the agreement, whether it be a date or upon completing an objective. An agreement with indefinite length appears to be an employment contract.

⁵ Per project (or, in some industries, per hour) pay arrangements more strongly indicate that an Independent Contractor agreement exists. Avoid paying a typical salary.

⁶ One of these two clauses should be chosen; both cannot be included.

⁷ It is advisable to avoid paying contractor expenses if at all possible. This factor can be considered evidence of an employment relationship.

⁸ If this passage is used, this term should be well defined and limited to the specific expenses that may be reimbursed.

⁹ Companies that engage independent contractors should ask them to fill out a W9 (Request for Taxpayer Identification Number) and, if they pay a contractor \$600 or more in a year, to issue a 1099-MISC. See: <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Forms-and-Associated-Taxes-for-Independent-Contractors>.

¹⁰ This provision is likely inapplicable to most IC contracts. Moral rights are defined as a specific set of rights of creators of copyrighted works, including the right of attribution, the right to have a work published anonymously or pseudonymously, and the right to the integrity of the work. Preserving the integrity of the work bars the work from alteration, distortion, or mutilation. Moral rights are distinct from any economic rights tied to copyrights. Even if an artist has assigned his or her copyright rights to a work to a third party, he or she still maintains the moral rights to the work.

¹¹ Independent Contractors have no legal obligation to maintain the confidentiality of a company's information. Due to this, companies should include contractual confidentiality clauses in this agreement to protect the confidential information an Independent Contractor will learn through its work with the company. However, a company must note that these restrictive clauses can be used as evidence of an employee relationship by the IRS, DOL, and PA courts. Thus, the company should carefully consider how important such a clause is in the context of each individual Independent Contractor agreement. Companies can limit the restrictiveness of the clause to the particular circumstances of the relationship or make the

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obligations mutual (i.e., imposing them against the company by the Independent Contractor as well).

¹² This is entirely optional and not applicable to many start-ups. However, for Construction companies, this is a must due to the Construction Workplace Misclassification Act (43 Pa. Stat. Ann. § 933.3(b)(6)).

¹³ Companies should not restrict the independent contractor's ability to take on other work during the term of the engagement because this indicates an employee relationship. The Independent Contractor's ability to work for multiple clients is an important indicator of self-employment. However, there are cases where the company may find it unacceptable for an Independent Contractor to work for a competitor or take on other work that limits the Independent Contractor's ability to fulfill their commitment to the company. This clause provides a middle ground in those instances.

¹⁴ The geographic references in this provision should be updated to fit each company's situation.