



Consultants: An attorney discusses what to look out for

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Virtually every type of business works with consultants at some point. Some work with a variety of consultants all the time. When the economy is slow, companies tend to use consultants even more, in order to avoid having to pay employee benefits. They are usually outside companies which provide some type of special service. There might be graphic design and website consultants. On construction projects, there may be electrical and HVAC consultants. Sometimes consultants are outside individuals that companies work with a few hours per week when they do not want to have additional full-time employees.

Often companies hiring consultants treat the relationship so casually that they do not have any contractual agreement. That is not a good idea. Both the company and the consultant should want to confirm that the person or company is actually an outside consultant to differentiate them from employees. While many businesses treat consultants as if they were employees, by definition they are not the same. An "employee" is someone who works full-time, at least 40 hours a week usually, and has benefits. The employer withholds taxes and pays social security to the government for the employee.

The work done by consultants is owned by the employer. Thus, if an architect or an interior designer, for example, designs furniture for a project for the firm, it is owned by the design firm and not by the individual designer. The same would be true if an employee designed new software for a company project. Frequently problems arise when consultants try to get publicity independently for projects they worked on for a company, when it was not really their project to publicize.

A consultant is someone outside the firm who is hired to do some work for the company on a limited basis. It may be for a few hours a week or for a project that lasts for a few months. The consultant has his or her own firm, supplies and equipment and its own office location. They have their own business expenses and pay their own taxes and withholding. The consultant can determine when to do the assignment and most likely does not spend the entire day there working on projects for the company.

I always counsel companies to have agreements with consultants which contain indemnification provisions and provisions confirming who owns the work product, who gets the credit and describing the services they will be providing. The consultant usually has his own corporation set up and should have its own liability insurance policy. They may be paid hourly or a fixed fee. If the company wants to eliminate any doubt about ownership of work product, they must make it clear in the contract with the consultant.

Problems in this area come about when someone is called a "consultant" by the company, but they are really an employee. Everything about the individual's work environment is that of an employee, except their title and the way they are paid. If they are working exclusively for the company and an audit is ever conducted by the government, the individual would probably be deemed an employee.

and the company may have a problem with not having paid taxes and social security for them. The clients of the company, especially small companies, may also be confused about the consultant's status.

In order to eliminate any confusion, the parties should be clear about their roles and stick to them. If they are truly consultants, they should be set up and function as separate businesses. If they are employees, they should be treated as such. If they are consultants, they should have a contract for services with appropriate provisions drafted by an attorney knowledgeable in this area. This will do a lot towards eliminating problems in the future.

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