

LEGAL PERSPECTIVE

Attorney cites considerations for agents operating as independent contractors.

ACCORDING TO a 2014 National Association of Career Travel Agents (NACTA) report, over half (52 percent) of NACTA's agent members are "hosted" independent contractors (independent contractors working with the same host agency or franchise organization). Moreover, 36 percent of NACTA's agent members are fully independent agents (not affiliated with a host agency or franchise organization).

For brick-and-mortar travel agencies, relying more on independent contractors and less on staff employees can significantly reduce company overhead costs and provide attractive tax benefits. For example, there is no require-

ment to withhold dollars for taxes; no need to pay the employer's portion of Social Security and Medicare taxes; and no requirement to pay premiums for workers' compensation or underemployment insurance. Instead, independent contractors bear the burden and are responsible for a self-employment tax and for their own withholding via quarterly payments to the IRS.

pendence. Whether called an independent contractor, "freelancer," or simply "self-employed," these titles reflect the freedom that is appealing to so many professionals. The independent contractor travel agent acts as his or her own boss, with no one controlling how the work is performed. Hired to perform a particular job, he or she is in control of the amount of work accepted and the amount of money earned. Additionally, there are tax benefits for the independent contractor, too. While it is true that independent contractors must make quarterly estimated tax payments to the IRS, no federal or state taxes are withheld from paychecks as they are for traditional employees. The end result is that the independent contractor travel agent can hold onto that commission a little longer before giving it over to Uncle Sam. On top of that, all necessary and reasonable business expenses can qualify as tax write-offs (including commuting expenses). Accordingly, an independent contractor can take advantage of many business-related tax deductions that are not available to traditional employees.

Risks and Liabilities

Risks and liabilities do remain, however, for both the independent contractor and the travel agency. While being an independent contractor means more freedom, it also means less job security. An independent contractor will undoubtedly feel the impact of a business slowdown more swiftly than a traditional employee, who will enjoy at least some modicum of job security in the event of a temporary business downturn. Also, in most cases the independent contractor is not eligible for many employer-provided benefits available to traditional employees.

On the agency side, there is the risk of the skeptical eye of the Federal government. The IRS has been cracking down on the misclassification of independent contractors in recent years, in the fear that independent contractors have been under-reporting their revenue as taxable income. From the perspective of The U.S. Department of Labor, concerns exist that misclassified independent contractors may be denied benefits coverage under laws originally designed to protect workers. Travel agency operators should be aware that an unfavorable audit may expose the agency to financial burden and other headaches, including taxes, insurance fees, and penalties from the IRS and Department of Labor, including the Employment Development Department and the Workers' Compensation Appeals Board.

Independent Model

For travel agencies who have weighed the risks and benefits and desire to proceed with the independent contractor model, the agency operator must be certain not to misclassify a worker as a contractor when that worker is actually an employee. The Federal government will be eager to tag an agency if it perceives a "misclassification," and the penalties may be stiff. It's important to adhere to the three basic criteria below in properly classifying an employee as an independent contractor or not, as put forth by the IRS itself. Only if you answer no to all three questions, should the worker be classified as an independent contractor.

1) Behavioral: Does the company control or have the right to control what the worker does or how the worker does his or her job?

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Benefits

In light of these obligations, one might question the benefits for the independent contractor. One of the main incentives for many individuals is inde-

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2) Financial: Are the business aspects of the worker's job controlled by the payer? (These include how a worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)

3) Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc)? Will the relationship continue and is the work performed by a key aspect of the business?

Be honest and critical in your assessment of the agency's relationship with the worker—the penalties of "misclassification" are not worth the risk.

Adequate Coverage

Finally, ensure that your travel agency is properly insured. Proper coverage entails more than a Commercial General Liability (CGL) policy; you will also need Travel Agents' Professional Liabil-

ity Insurance, more commonly referred to as Errors and Omissions Insurance (E&O). A good such policy should provide worldwide liability E&O coverage, in addition to Bodily Injury and Property Damage insurance.

It is important to remember that each insurance policy is different, with unique terms and conditions. As a general rule, however, independent contractors who are acting pursuant to the duties of the scope of the host agency, will be covered under the host agency's errors and omissions policy.

Qualifying independent contractors can now obtain E&O Insurance for individual agents at a reasonable premium. This will provide the contractor with the certainty of protection. In securing proper insurance, start with a trusted insurance agent or broker for their recommendations. In all cases, be sure to review several providers and

obtain at least three quotes to compare rates and coverage. Find a program that has personnel with experience underwriting exposures for professional liability claims for travel companies. Ask your contact at the program about insurance policies directed specifically toward independent contractors.

If you pursue this model, act as you would in any other operation of your agency. Use sound practices to ensure that your classification is accurate, and ensure that you have an insurance program that fits your business model.

The author, Michael L. Detweiler, Esquire, is a shareholder in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin. As a member of the firm's Professional Liability Department, he represents travel agents, tour operators, resorts and other industry professionals in the defense of claims and lawsuits brought against them.

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