

FARALLON LAW GROUP NEWSLETTER

(MAY, 2011)

Key Terms of Independent Contractor Agreements

➤ **What is an Independent Contractor Agreement?** An independent contractor agreement (“IC Agreement”) usually refers to an agreement by which a non-employee person or company provides any services to a client. The term is often used interchangeably with contractor agreements, consultant or consulting agreements, or services or master services agreements- but each of which can have different meanings. A subcontractor agreement differs in that the services are provided to a prime contractor who provides services to the client.

➤ **Why are IC Agreements Important?** Independent contractors are used by nearly all businesses- large and small, private and public. IC Agreements set forth the terms under which the services are provided and compensation paid. Without an IC Agreement, the terms of the relationship could be vague and open to interpretation and dispute.

➤ **Key Business Terms of IC Agreements** Often the most important terms of IC Agreements are the business points, such as:

- What is the scope of the services and the deliverables to be produced/provided?
- What is the timing to start and finish the services?
- How is the contractor to be compensated- flat fee, time and materials, cost plus or some combination of the foregoing?
- Are any expenses or costs to be reimbursed?
- What is the term that services are to be provided?
- Who can terminate the relationship, for what reasons and on how much notice?

➤ **Intellectual Property Ownership** Business owners are often unaware of the general rule that any intellectual property rights, including copyrights, patents, trade secrets and rights to confidential information (“IPR”), which are developed by contractors are owned by the contractor, *even if* they are paid for the work by the client. If there is no

written agreement on this point, then the contractor owns the IPR but the client likely has an implied license. An IC Agreement should therefore state who owns any IPR that is developed (whether solely or jointly) and whether the other party has a license to use that IPR. Consider also if the IPR developed uses pre-existing IPR of a party.

➤ **Confidentiality** Confidentiality obligations (one way or mutual) should be addressed in an IC Agreement to protect confidential and proprietary information that is disclosed. The client will always want their information protected. If the contractor will also be disclosing information, they will need it to be protected as well.

➤ **Non-Solicit and Non-Competition Obligations** Clients may request that a contractor agree not to solicit the client’s employees, other contractors or customers and not to compete with the client’s businesses or activities. These restrictions will apply during the term of the agreement and for some specified period of time thereafter. They can be very broad and thus have a significant impact on the future opportunities of contractors. In light of recent California case law, these obligations may not be enforceable, particularly where they extend beyond prohibiting the use of the confidential information.

➤ **Confirmation of IC Status** IC Agreements will typically include statements confirming that the contractor is only an independent contractor. The client wants to make sure that individual contractors cannot claim that they were an employee and thus entitled to receive employment benefits, etc.

➤ **Other Legal Terms** IC Agreements may also contain limitations on liability (a liability cap and a waiver of consequential damages), representations and warranties and other legal terms and conditions that could be unreasonable and significant.

Please feel free to contact Boris Lieberman or Mario Kashou at 415-255-2450 if you have questions about independent contractor agreements.

This Newsletter is intended as a general guide to law issues and developments. It does not contain a general legal analysis or constitute a legal opinion of Farallon Law Group LLP or any member of the firm on the legal issues described. It is recommended that readers not rely on this general guide in structuring individual transactions but that professional advice be sought in connection with individual transactions.