

In partnership with the Chamber, our objective is to provide Chamber members with information on the complex US legal landscape, which might assist in US-NZ business relationships, and to assist NZ businesses expanding into the lucrative US markets. In our monthly column, we write about legal issues which we deal with in our representation of NZ businesses doing business in and with the US, however, we are also open to suggestions on topics about which members are interested in learning. So, please feel free to email us with your comments, questions and any suggested topics at info@nz-uslegal.co.nz

US Employment Issues – Part 2 – The Independent Contractor*

In our Auckland practice we have the privilege of working with many New Zealand clients that are expanding their businesses into the United States. Often times these clients enter into contractual relationships with American distributors or sales agents/marketing representatives rather than sending one of their own employees to the US to work. Such an arrangement is usually entered into to avoid problems such as immigration issues, direct employment costs and expenses, taxation concerns, as well as management and control concerns among many others. Prior to entering into business arrangements of any sort with US individuals or business entities, NZ businesses must exercise extreme caution and proper due diligence.

It is easy to believe that a simple agreement providing an outline of the parties' obligations to each other is all one needs in these situations. However, in order to convey legally binding *independent contractor* status in the United States and in the individual State with jurisdiction over the contract, one must be careful regarding the specific wording of the contracts. Improper and/or imprecise contractual language can result in an individual being classified as an employee rather than an independent contractor, thereby exposing the NZ party to liabilities. Examples of the liabilities that could result from improperly and/or imprecisely worded Independent Contractor Agreements include being liable for the contractor's (now classified as an employee) actions and/or omissions and for payment of US payroll taxes and employment benefits.

Where an NZ business is employing an individual to act on its behalf in the US, unless that individual is treated as an independent contractor (as documented in the contractual language used) the individual could be reclassified as an employee. Generally, under US law, an independent contract must include specific language that demonstrates the following:

1. That the NZ Company does not control. This is determined by looking at whether the NZ Company instructs:
 - a. When and where to do the work;
 - b. What tools or equipment to use;
 - c. What workers to hire or to assist with the work;
 - d. Where to purchase supplies and services;
 - e. What work must be performed by a specified individual; and
 - f. What order or sequence to follow in doing the work.

2. That the NZ Company does not specifically train to perform a service in a particular manner (the independent contractor ordinarily uses their own methods).
3. Who controls their own financial matters related to the contract. Thus, the NZ company should avoid:
 - a. Reimbursing the worker for all business expenses;
 - b. Prohibiting the worker from investing in their own facilities or working for other clients;
 - c. Paying the worker a salary. Payment should be structured on a flat-fee basis such as lump sums on agreed-upon dates, or that are contingent on the occurrence of events or mile markers agreed upon in the Independent Contractor Agreement, or on an hourly or commission basis;
 - d. Insulating the worker from making a profit or loss by providing the worker with a workplace, tools, materials, equipment, supplies and other business costs.
4. That does not receive employee benefits from the NZ Company.
5. That is responsible for the payment of all taxes related to any compensation or payment arising out of the Independent Contractor Agreement.

(These are general requirements only and vary depending on specific circumstances and the state in which the contract will be based).

The above-stated required characteristics of an independent contractor must be reflected in the language of the Independent Contractor Agreement. If exacting control is required by the NZ Company over the worker, then advice should be obtained on whether independent contractor status is actually available under the circumstances. Careful legal drafting techniques should be used which consider both US federal and state specific law for any Independent Contractor Agreement.

- Zachary D. Norris, JD, LL.M. and Ada Echetebe, JD, LL.M.

*This article is for general informational purposes only and does not constitute legal advice, nor should it be construed as constituting any legal advice from Norris Legal Consulting, The Norris Law Firm or any of its affiliated lawyers. For specific analysis of your US legal issues, please contact the attorneys at Norris Legal Consulting at +64 (0)9-889-2602 or visit us on the web at <http://nz-uslegal.co.nz/>