

AVOIDING LEGAL PITFALLS –
Through Education, Strategies, and Policies -
For Small Businesses & Consultants

By
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TYPES OF BUSINESS ORGANIZATIONS

	Sole Proprietorship	Incorporated
How		File articles of incorporation (organization) bylaws (operating agreement)
Liability	All (personal, contract, employees) No shield. Any claim re your business acts/omissions may be brought against you, personally i.e.: breach of contract, torts, collections, harassment, discrimination. Judgments may be satisfied from your personal assets: house etc	Corporate shield. Shielded from all but your own. Claims may be brought against the business only (unless you “are” the business i.e. alter ego or PCV). Judgments may be satisfied only from business assets (subject to alter ego/PCV)
Taxes	One level of taxation (as opposed to C corp)	May be one level of taxation i.e.:pass through.
Warning		Keep up with formalities

Partnership	<p>Partnership can be created with a “handshake” or through words, avoid inadvertently creating a partnership.</p> <p>Liabile for partners’ acts/omissions. (Yours, mine, ours)</p> <p>Can be bound by partners’ contracting w/3d Pangborn on “behalf” of P’ ship.</p>
Employee	<p>Receives certain benefits and regard: may not wrongfully terminate, may not discriminate, may not harass.</p> <p>May be restricted: non-solicitation (NOT non-compete), protect trade secrets, protect confidential and proprietary information</p>
Independent Contractor	<p>Does not merit the same benefits and regard. Beware that IC can not be characterized as an employee.</p>
Employer	<p>Liabile for employees’ acts/omissions.</p> <p>Obligations: pay payroll taxes etc., withholding; WC insurance;</p>
Contractor	

Employee	Independent Contractor
Controls manner and means of performance	ownership of tools
physical, philosophical, procedural control (work routines, hours, fees, appointments, philosophy)	usually sets schedule, philosophy etc
employee benefits	no benefits
supervision	little or no supervision, accountable for the result
tax obligations on employer	tax obligations on IC
employer liable for employee's acts/omissions	IC liable for own acts/omissions
covered by FEHA and Title VII and minimum wage laws	Not covered by FEHA and Title VII or minimum wage laws
may bring a suit for wrongful discharge	may not bring a suit for wrongful discharge
terminology: hire, employer, employee	contract for, retain, engage, customer, client, IC, contractor, consultant, service provider

CONTRACT FACTORS

Who do you have a contract with?

Contractor
subcontractor
employer
employee

What do you want governed by contract?

A good contract is a “kitchen sink” contract.

EXAMPLE ITEMS FOR CONTRACT CONTENT

Compensation
Cost allocation
Space Sharing
Good Will
Patient Records
Management
Benefits
Coverage
Ownership Rights
Solicitation
Competition
Use of Facilities
Taxes
Dissolution
Liability allocation
Confidential/Proprietary
Buy/Sell
Characterization of Employment
Length of Contract
Nature of Work

MARGOT'S SPECIALTY

Avoiding discrimination/harassment claims?

FACTORS DISTINISHING INDEPENDENT CONTRACTOR FROM EMPLOYEES

1. Whether the one performing services is engaged in a distinct occupation or business;
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
3. The skill required in the particular occupation;
4. Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
5. The length of time for which the services are to be performed;
6. The method of payment, whether by the time or by the job;
7. Whether or not the work is a part of the regular business of the principal;
8. Whether or not the parties believe they are creating the relationship of an employer-employee.
9. The right of the principal to end the service whenever he or she sees fit to do so-the right to discharge at-will and without cause is a strong factor demonstrating employment.
10. Whether the individual performed services exclusively for the principal (indicating an employee status), or whether the individual was free to perform similar services for others. *Garrison v. California Employment Stabilization Commission, et al.*, 64 Cal.App.2d 820, 149 P.2d 711 (1944); *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, *supra*; *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, *supra*.