

# ***Running Your Business – Contracts, Overtime, Employee/Independent Contractor, Insurance and Litigation***

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# ANTITRUST POLICY STATEMENT FOR SPRAY POLYURETHANE FOAM ALLIANCE MEETINGS

- ▶ It is and shall remain the policy of the Spray Polyurethane Foam Alliance (“SPFA”), and it is the continuing responsibility of every SPFA member company, SPFA meeting or event participant, as well as SPFA staff and leadership to comply in all respects with federal and state antitrust laws. No activity or discussion at any SPFA meeting or other function may be engaged in for the purpose of bringing about any understanding or agreement among members to (1) raise, lower or stabilize prices; (2) regulate production; (3) allocate markets; (4) encourage boycotts; (5) foster unfair or deceptive trade practices; (6) assist in monopolization; or (7) in any way violate or give the appearance of violating federal or state antitrust laws.
- ▶ Any concerns or questions regarding the meaning or applicability of this policy, as well as any concerns regarding activities or discussions at SPFA meetings should be promptly brought to the attention of SPFA’s Executive Director and/or its legal counsel.



# Managing your Company's Contracts

- Do you know what's in your form contracts?
- How often are your contract forms reviewed and updated?
- What most concerns you about your contract form or contracts you are asked to sign by other parties?
- What terms do you view as non-negotiable?

## Scope of Services

- One of the greatest sources of disputes/confusion
- Use sufficient specificity so that both parties know what services or products are being provided.
- If necessary, incorporate a more detailed schedule of services or addendum.
- Do you specify materials to be used?
- What about changes in scope of services?
- Do you use change orders?
- Remember, vague terms are construed against the party that drafted the agreement

## Standard of Performance

- What level of performance standard do you reference in your contract?
- Workman-like; consistent with industry standard, or according to standard practices?
- Do you provide warranties? If so, what do you warrant?
- Do you reference manufacturer's warranties?
- What does your warranty disclaimer provide?

# Term of Agreement

- When do you start? What is the end date?
- Is time of the essence?
- How about service or product contracts with third party vendors?
- Be wary of long term contracts and be conscious of contracts with automatic renewal clauses.

# PAYMENT

- What are the terms and conditions of payment?
- Is payment in full due up front? Deposit now, remainder upon completion?
- What are the consequences for late or non-payment?
- Attorneys' fees if you have to collect?

## Limitations of Liability

- Does your contract include disclaimers of liability?
- Are they highlighted, in bold, larger type and in clear language?
- “To the extent permitted by law,.....”
- What do you warrant in the way of services or products used?
- Do you reference manufacturer warranties for products used?



# Warranties

- What is a warranty? A promise or guarantee to stand behind a product or service made by the installer or manufacturer or seller at the time of a major purchase or transaction.
- Must be made available to read BEFORE a purchase under federal law.
- They can be express or implied, depending upon whether the warranty is explicitly provided and the jurisdictional requirements.
- Warranties provided in the sale of goods vary by jurisdiction, but most new products are sold with an implied warranty that they are as advertised.

## Warranties- Continued

- *Used* products may be sold “as is” with no warranties, depending upon state law.
- Various state and federal laws may apply, including the UCC, which provides implied warranties.
- Implied warranties are *unwritten promises that arise from the nature of the transaction*.
- UCC provides that two warranties are implied unless specifically disclaimed in writing: *the warranty of merchantability* and *the warranty of fitness for a particular purpose*.

## **Warranties-Continued**

- How long do you want the warranty to last?
- When does warranty period begin and end?
- What conditions or events may void the warranty?
- What obligations are imposed on the consumer or purchaser?
- Who is the contact to assert the warranty?
- What do you do if the product or service fails and the warranty is asserted?
- Do you replace the product? Redo the work?
- What conditions or limits are placed on the warranty? Some warranties only cover if the product is used or maintained as directed.

## More Warranties

- To be effective, a disclaimer of an implied warranty must be clearly and explicitly stated at the time of the contract.
- Use wording that clearly communicates the risk to the consumer/buyer.
- Disclaimer of the two implied warranties must be in writing and conspicuous.
- In most instances use of “as is,” “with all faults,” or “there are no warranties beyond those described” are sufficient to disclaim the implied warranties. Language will be strictly construed against the seller.

# Indemnification

- What is indemnification and why is it important?
- Never agree to one sided indemnification, where you agree to indemnify, but where there is no reciprocal duty back to you.
- Mutual indemnification is fair and equitable and hard to argue against.
- Harder to require when contracting with governmental entities. Insert, “To the extent permitted by law.....”

# Dispute Resolution

- How do you want a contract dispute to be resolved? Civil litigation? Binding arbitration? Prefaced by mediation?
- Who is responsible for legal fees?
- What state law will govern the litigation?
- Do you have a favored venue to hear claims?

## Termination or Default

- How can the contract be terminated? How do you terminate? How can the client/customer terminate?
- What constitutes a breach or default of the contract? Must it be a “material” breach?
- Is there a cure period stated?
- Is late payment grounds for termination?

## Miscellaneous Provisions

- Notices under the contract – who is the proper party to notify? What is an acceptable form of notification?
- In the event of litigation, who pays legal fees? Is each party on its own? Does prevailing party secure reimbursement of reasonable legal fees?
- Non-waiver of rights clause



## Miscellaneous Provisions

- No assignment without consent of non-assigning party?
- Is the contract binding upon a successor or assign?
- Does the contract document merge all prior written or oral discussions or agreements? Does it incorporate schedules or change orders that may subsequently arise?
- Can it be amended? How? Not without prior written consent of both parties.
- Are the signatories to the contract authorized to bind the respective parties?

## **Your Business Insurance**

- Key component of risk management for any business.
- Do you review your insurance needs and policies with your agent or broker? Ask the hard questions.
- Remember, it's a binding contract.
- Common law duty to read the policy.
- Understand what is covered and what is excluded.
- Annually examine the limits of coverage under each policy.

# Key Coverages

## **Commercial General Liability Insurance**

- Scope of coverage – coverage for bodily injury and property damage

## **Excess Liability or Umbrella Coverage**

- Liability limits over and above CGL

**Business Property Coverage** – Confirm property and equipment values annually

**Workers' Compensation** – List all states

## **Professional Liability/Errors and Omissions**

- Coverage for losses arising out of performance of professional service

**Certificates of Insurance** - Frequently ignored

# Employee vs. Independent Contractor

- IRS uses twenty factors in determining if someone is an employee or independent contractor.
- The key consideration is the **level of control** exercised by the employer.
- Proper classification is critical especially with regard to state and federal withholding taxes, social security, etc.
- A bad decision can result in the business responsible for payment of withholding being liable for unpaid amounts, including possible interest and penalties.
- What you call the relationship is of no import.
- The IRS will look at all of the underlying facts.

# Employee vs. Independent Contractor

- IRS describes the employment relationship as: *“when the person for whom services are performed has the right to **control and direct** the individual who performs the services, **not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished...**An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient if the employer has the right to do so.”*

# Employee vs. Independent Contractor

- By far and away the most important consideration is the “control” over the work.
- Another key component of the examination is the “integration” test – *where the work done by the individual is a fundamental part of the business being conduct.*
- The IRS has a long standing (since 1987) list of criteria or factors it considers in assessing the final classification.
- Each factor is considered, though “control” remains the overriding consideration.

# Employee vs. Independent Contractor

- **Instructions** – One who is required to follow instructions of others as to *when, where, and how* to perform the work is normally viewed as an employee.
- **Training** – Requiring an experienced worker to assist, or to require training to perform the work in a specific way further evidences employee status.
- **Integration** – Where the success of the business is substantially dependent on the performance of certain services, those who perform those services are likely to be deemed under the employer's control.
- **Personal** - Requiring services to be performed personally is evidence of employee status.

# Employee vs. Independent Contractor

- **Hiring, supervising or paying assistants** – If the business for whom the work is being performed is responsible for hiring, supervision and payment of assistants, this typifies employee status. If the individual performing the work does the hiring, supervising and payment of others to do the job, this is indicative of an independent contractor relationship.
- **Continuing Relationship** – A continuing relationship, even if interrupted, is evidence of employment.
- **Set hours of work** – Established hours is indicative of control and therefore employment.



# Employee vs. Independent Contractor

- **Full time requirements** – If the individual must work full time for the business and does not have the time or ability of the person to perform work for others, that indicates employment. A true IC is free to work when and for whom he or she elects.
- **Working on Premises** – If the employer requires the individual to work on the employer's premises, this indicates control, or if the employer directs that the individual perform the work at a specific off-site location – the same result.
- **Order of sequence set** – If a worker must perform the work in a particular order/sequence set by the person for whom the work is being done, this indicates control.

# Employee vs. Independent Contractor

- **Oral or written reports** – Requiring the submission of regular reports is indicative of control.
- **Payment** – Compensation by the hour, week or month as opposed to by the job or a lump sum is indicative of control and thus employee status.
- **Payment of Expenses** – Paying travel and other expenses or the worker is evidence of control.
- **Tools and Materials** – If the business provides the tools, materials and other equipment needed to perform the services, this suggests employment. An IC provides his or her own equipment, materials and supplies to do the work.

# Employee vs. Independent Contractor

- **Investment** – Does the worker make a significant investment in facilities not normally maintained by the employer, or in personal education not normally provided by the employer – if so, this suggests IC status.
- **Realization of Profit or Loss** – A worker who can realize profit or loss as a result of the arrangement (other than mere payment for the services) is more often deemed an IC.
- **Working for Others** – If the worker can perform services for other parties at the same time, this indicates IC status.

# Employee vs. Independent Contractor

- **Available to the Public** – Are the worker's services also available to the general public on a regular basis. If so, this suggests IC status.
- **Right to Discharge** – The right to fire a worker is indicative of employee status. An IC can't be discharged if he or she produces the result contracted for.
- **Right to Terminate** – If the worker has the right to terminate the relationship without incurring liability, this indicates employee status.
- *In the end, it can largely come down to who controls the time, place, scope and manner of the work performed.*

## Overtime and Exempt v. Non-Exempt Employees

- FLSA requires employers to pay at least the federal minimum wage for all hours worked and overtime at one and one-half times the regular rate of pay for all hours worked over 40 in a work week.
- There are exemptions from the overtime requirements for Executive, Administrative, Professional, Computer Employees, and Outside Sales.
- To qualify for the **Executive Exemption**, the employee must be compensated on a salary basis at not less than \$455 per week.
- Primary duty must be managing the business or a recognized department or subdivision of the business.

## Overtime and Exempt v. Non-Exempt Employees

- Employee must customarily and regularly direct the work of at least two (2) or more FT employees or their equivalent.
- The Employee must have the authority to hire or fire other employees, or his or her suggestions or recommendations must be given particular weight.
- **Administrative Exemption** is available to an employee compensated on a salary basis at a rate of not less than \$455 per week.
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers.

## Overtime and Exempt v. Non-Exempt Employees

- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance to the business.
- The **Professional Exemption** is available to an employee compensated on a salary basis at a rate of not less than \$455 per week.
- His or her primary duty must be the performance of work requiring advanced knowledge, defined in the regulations as work which is predominantly intellectual in character and which includes work requiring consistent exercise of discretion and judgment.

## Overtime and Exempt v. Non-Exempt Employees

- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- For a **creative professional**, he/she must meet the salary test and his/her primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- The **Computer Employee** exemption is available for employees paid on the salary basis (not less than \$455 per week).



# Overtime and Exempt v. Non-Exempt Employees

- The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled work in the computer field performing the following primary duties: 1) application of systems analysis techniques and procedures, including consulting with users, 2) design, development, analysis, creation or modification of computer systems or programs; 3) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) a combination of the above.

## Overtime and Exempt v. Non-Exempt Employees

- The Outside Sales exemption applies to an employee whose primary duty must be making sales or obtaining orders/contracts for services or for use of facilities for which consideration will be paid by the client/customer.
- The employee must be customarily and regularly engaged away from the employer's place or places of business.
- *Remember*, the exemptions apply only to “*white collar*” employees who meet the salary and duties tests. The exemptions do **NOT** apply to manual laborers or other “*blue collar*” workers who perform work involving repetitive operations with their hands.

# Overtime and Exempt v. Non-Exempt Employees

- The FLSA applies on a workweek basis.
- An employee's workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24 hours periods.
- It doesn't need to coincide with the calendar week, but may begin on any day and at any hour of the day.
- The regular rate of pay cannot be less than the minimum wage.

## Preparation for Litigation

- What do you do if the company is sued?
- First, don't panic.
- You have a statutorily provided period of time to respond to the complaint or petition after service, either with an answer and defenses or motion.
- Second, notify your legal counsel and notify your insurance agent/carrier, providing a copy of the summons and complaint.
- Do not limit the notice to only one of your policies. Ask your insurance agent if there may be more than one policy under which coverage can be found.

## Preparation for Litigation

- Identify and interview all employees involved in or who have knowledge of the facts surrounding the event or incident which is the subject matter of the complaint.
- Locate and store in a separate and safe place all of the relevant records and documentation related to the incident or complaint, including emails, correspondence, faxes, notes, memos, etc.
- Instruct staff NOT to speak with anyone on the matter except the designated company contact, your legal counsel or the carrier's appointed legal counsel. One story – one source.
- Any calls should be routed to legal counsel.

## Preparation for Litigation

- Have everything ready and available for when the insurance company's appointed defense counsel arrives, including key employees.
- Have a single point of contact within the company.
- Produce everything for your legal counsel. Hold nothing back. Tell the entire story truthfully and do not leave anything out.
- Lawyers hate surprises. So do insurance companies.
- When in doubt, call your legal counsel with any questions and stay abreast of the progress of the litigation. Be vigilant.
- Don't hesitate to ask legal counsel any questions you have about the process.

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