

Employment Contract

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What is an Employment Contract?

- An Employment Contract is what employers and employees use to clearly outline the rights, responsibilities, and obligations of the parties during the work period.
- It may include information about compensation (pay/wage), vacation time, the job description and duties, probationary periods, duties of confidentiality, termination procedures, and information about both the employee and employer.

What are the different types of employment?

- ▶ Employees are people who work for a business and who receive monetary compensation from the employer in return for their services. Since there are various types of employment, you will need to ensure that you are classifying your workers properly in any contracts that you create with them.
- ▶ Employment types include:
- ▶ **Permanent Full Time:** A permanent full time employee is someone who will be meeting the requirements for full time hours and who has no predetermined end date to his or her employment.
- ▶ **Permanent Part Time:** A permanent part time employee is someone who will not be meeting the requirements for full time hours and who also has no predetermined end date to his or her employment.
- ▶ **Fixed Period or Term:** An employee who is on a fixed period or fixed term employment has a prearranged end date to their employment. The contract automatically expires on the end date, and no notice is required from either party to end the employment at that time.
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What is a probationary period?

- ▶ It is common for employers to require that a new employee complete a probationary period of 3 months or more.
- ▶ This period is used to determine if the employee will fit with the company's goals, if they have the necessary skills to perform the required tasks, and if the employer or manager believes that they are capable of being a part of the company long-term.
- ▶ An employer may terminate its working relationship with the employee at any time during the probationary period without cause and without need to provide notice or severance pay.
- ▶ After the probation ends, and the company has decided to continue to employ the new hire, the employee qualifies for any health or other benefits that other workers of the same nature within the company receive.
- ▶ Once the employee has passed their probation, the company is then required to either have just cause to terminate an employee or to provide adequate notice upon termination and/or severance pay to the employee.

What are non-compete, non-solicitation, and confidentiality clauses?

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Employers will often include non-compete, non-solicitation, and confidentiality clauses in their Employment Contracts. These clauses serve to protect the employer from many different circumstances that could otherwise cause the company to lose business, employees, and trade secrets.

- **Non-Compete (or Non-Competition):** A non-compete clause keeps the employee from working for direct competitors of the business during and after their work relationship has ended. Non-compete clauses generally last for a certain amount of time post-termination, and must meet certain requirements to be enforced, such as being limited to a reasonable geographic location.
- **Non-Solicitation:** A non-solicitation clause keeps the employee from encouraging other employees or customers/clients of the employer to move to another company or service provider. These clauses must also meet certain restrictions to be considered valid, and generally last for a predetermined amount of time (such as 2 or 3 years from the end of the employment relationship).
- **Confidentiality:** A confidentiality clause keeps confidential work information private. It bars the employee (or former employee) from discussing or using company secrets, marketing plans, and product information without the express permission of the company.
- Confidentiality clauses can either last indefinitely (until the information enters the public domain through a third party), or have an expiration date (for example, 2 years after the contract ends).
- Any clause that you include in your Employment Contract must be fair and reasonable to both parties, as well as legal, to be considered enforceable in a court of law.

What is a Confidentiality Agreement?

A Confidentiality Agreement is used by individuals or businesses to protect information, ideas, transaction details, and more from being revealed to an outside source during the course of a business deal, project, or employment agreement with another party.

- **What is the purpose of a Confidentiality Agreement?**
- A Confidentiality Agreement is used to protect the disclosure of various types of information, such as:
 - **Customer information**, which deals with any information relating to customers or clients of an employer, including client lists, contracts, and business relationships
 - **Intellectual property (IP)**, which includes any intellectual property owned by an employer, including patents, trade secrets, proprietary software or production processes, copyrights, and other test data collected by the employer; it may also apply to computer technology and scientific information used by an employer
 - **Marketing information**, which refers to any information, campaigns, or projects an individual or business wishes to conceal from third parties
 - **Business operations**, which consists of personnel data of an employer and its employees, as well as any internal cost information and operational procedures
 - **Product and service information**, which applies to procedures, packaging, equipment, and techniques used to produce a product or service
 - **Accounting information**, which comprises accounting procedures, payroll, software, reports, and more

When should I use a Confidentiality Agreement?

- A Confidentiality Agreement is recommended as the first step in situations when an individual or business needs to disclose sensitive information in the context of specific business negotiations, such as:
 - When an employer wishes to keep company information protected while negotiating a position with a potential new hire
 - When an independent contractor or consultant is being considered for hire and the client wishes to keep their company or personal information private
 - During a pending company acquisition (e.g. the research or "due diligence" phase) if the seller wishes to keep the proposed terms of the agreement and company information private
 - When two or more businesses or individuals wish to begin working together (e.g. a joint venture, merger, partnership, etc.) and the parties involved want to hold certain information discussed in negotiations in confidence

What is the difference between non-solicit and non-compete clauses?

- ▶ A **non-solicitation clause** prohibits an individual (for example, a former business partner or employee) from using insider knowledge to poach or entice away the employees or contractors working for the business.
- ▶ Alternatively, a **non-competition clause** prevents a party from starting a business that is in direct competition with your business or from revealing confidential information to a competing enterprise.
- ▶ With these clauses, you can list a time period in which the party must abide by the duties of confidentiality (i.e. the obligation to keep the information in confidence).
- ▶ Confidentiality Agreement allows you to set the time frames for confidentiality, non-solicit, and non-compete clauses. However, in order for your document to be enforceable, the time limits and the impact the clauses have on the parties involved must be fair and reasonable.
- ▶ For instance, a non-compete clause typically cannot be used to stop a lower-level employee from working for a competitor.

Are Confidentiality Agreements enforceable?

- While the laws vary with each state, Confidentiality Agreements that address specific private information are enforceable so long as:
 - The terms are not too broad
 - The terms do not unfairly restrict a party with excessive time frames or burdens
 - The confidential information is not against the best interests of the public
 - The classified information referenced in the Confidentiality Agreement is not already public knowledge (keep in mind, information described as trade secrets are typically considered confidential by nature and must be kept secret indefinitely)

What is an Independent Contractor Agreement?

- ▶ What is an independent contractor?
- ▶ Also known as a consultant or freelancer, an independent contractor is a business or individual that is typically self-employed and provides a product or service for a customer in exchange for monetary compensation.
- ▶ An Independent Contractor Agreement is a written contract that spells out the terms of the working arrangement between a contractor and client, including:
 - A description of the services provided
 - Terms and length of the project or service
 - Payment details (including deposits, retainers, and other billing details)
 - Confidentiality, non-solicitation, and dispute resolution clauses

Who can use an Independent Contractor Agreement?

11 Contractors, freelancers, or consultants who wish to have a written agreement with their client can create an Independent Contractor Agreement. Likewise, customers, clients, or businesses who hire contractors and wish to outline the service arrangement through a written contract.

What is the difference between an independent contractor and an employee?

► While there are many ways to distinguish an employee from a contractor, here are some of the most common ways an employer (or client) can differentiate between the two types of workers.

► **Independent Contractor**

- May have more than one customer
- Sends invoices to his or her customers
- Uses their own tools or equipment
- Has a personal investment in contracting business and may incur profit and loss as a result
- Customers have little overview of the work or services being provided
- Has signed an Independent Contractor Agreement
- Works on a fixed-term basis
- May hire employees or subcontractors to help complete services
- Does not receive employment benefits from clients or customers

Employee

- Employer controls how the employee's work is carried out, and when and where the employee works
- Employer controls the employee's wages
- May receive employment benefits, such as medical, pension, vacation, or sick pay
- Has signed an Employment Contract
- May undergo employment reviews
- Receives in-house training
- Employer creates his or her job description

Why should businesses classify workers properly?

- Keeping track of who is an employee and who is a contractor ensures a business is in a position to file taxes properly and comply with employment law.
- Employers must pay a portion of payroll taxes on employees, whereas independent contractors conduct their own personal tax filings.
- What happens when employees are misclassified as independent contractors?
- The U.S. Department of Labour (DOL) and the Internal Revenue Service (IRS) conduct regular company audits with the goal of finding employees who have been misclassified as contractors.
- The consequences for such misclassifications can range in severity depending on whether or not the misclassification is intentional, unintentional, or fraudulent.
- The ramifications for classifying employees as independent contractors can include:
 - A \$50 fine for each unfiled W-2 form
 - Monetary penalties from failing to withhold income taxes (potentially 1.5% of paid wages, 40% of FICA taxes not taken from employee wages, and potentially interest for late filing)
 - A failure-to-pay tax penalty, which can total anywhere between 0.5% and 25% of the employer's taxes depending on how long the employer has misclassified the employee and failed to pay the appropriate taxes
 - The IRS might also impose additional fines and penalties if they suspect fraud or intentional employee misclassification.

How do I protect the company's confidential information when working with a contractor?

Confidentiality is a concern for customers who may be entrusting private or sensitive information to an independent contractor who has been hired to carry out a service for the company.

In a contractor agreement, you can include terms to prevent a freelancer from divulging information about your business. There are also terms about non-solicitation and non-competition in the event there are conflicts of interest in the industry or a risk of competition. It should be noted that if the contractor fails to comply with these terms, it would put them in breach of the contract.

Who owns the intellectual property created by an independent contractor?

- ▶ Under U.S. copyright law the initial owner of the copyright in a "work for hire" is the person commissioning the work and not the person who actually created the work.
- ▶ Section 101 of the Copyright Act defines a "work for hire" to include work by employees in the course of employment, including creative work developed by an independent contractor in certain circumstances like a translation, a contribution to a collective work, and more.
- ▶ Alternatively, this contractor agreement can be tailored so the contractor retains complete ownership of the intellectual property but gives the company license to use the material.

Related Documents:

- . **Consulting Agreement**: similar to an Independent Contractor Agreement, this contract is used to outline the arrangement between a consultant and customer
- . **Service Agreement**: a contract used to cover the terms of a service between a customer and service provider
- . **Employment Contract**: a contract used between an employer and employee to address the terms of employment