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# *Contracting with consultants: Clarify roles, responsibilities*

## Spell out the scope of work and address liability issues

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Consultants serve a steadily increasing role in businesses and nonprofits, both as advisers and supplemental workers.

Older workers seeking (or forced into) partial retirement, combined with the needs of businesses for special expertise and their desire to reduce employee workforce in a stagnant economy, all contribute to this increase.

But employing consultants raises myriad legal issues. Those issues include scope of work, work product standards, work ownership, third-party liability should the client be harmed by the consultant's work, the consultant's ability to work for competitors and trade secret protection. Here follows information on some key areas companies and consultants should address.

**The scope of work.** Defining the scope of work can be exceedingly difficult and should be handled before the relationship begins. This is critical because once consultants begin, they often work as part of a team with company employees. Defining expected results often is easy. The pitfall is the failure to clarify the work the company needs to do in order for the consultant to succeed.

For example, if the consultant is going to develop the ordering system for the company's new Web page, the consultant and the company need to agree where the Web page work ends and the ordering system work begins. The company also should determine when the Web page will be ready so the consultant can finish the work and/or extend the consultant's contract if the Web page design is late

**Fees, expenses and payment.** Consultants and companies often define consultant compensation based on end-product delivery. Expectations often change mid-project, and the time or effort required of the consultant increases.

There should be a clear statement of expected fees, a possible change in fees, when payment will be made, who will staff the project for the consultant (possibly the company), whether the contract is assignable and who will pay expenses.

**Quality of work, liability and insurance.** Liability is frequently a sticking point. The company typically wants the world's best work product and for the consultant to bear liability for any damages the company incurs as a result of any mistake, delay or apocalypse.

The consultant wants to limit his liability as much as possible. A happy medium is to require the consultant's work meet reasonable professional standards and for the consultant to have a reasonable amount of insurance for professional negligence.

In a recent case, a federal appeals court held that a transit authority's insurance policy did not provide coverage for injury to a passenger that resulted from work performed by a consultant's employee. In this scenario, the authority will have an uninsured loss and probably will seek indemnification from the consultant. Both could experience substantial losses that easily could have been prevented if the parties had addressed the issue from the beginning.

Companies also need to address whether a consultant is covered by the company's insurance when the consultant is performing work for the company. In a typical consulting agreement, the company strives to ensure that the consultant is not an employee for purposes of labor and tax laws.

However, this also can mean that if the consultant is injured performing work for the company, the consultant is not covered by workers' compensation. As a result, the company may have exposure for injury to the consultant. This is an area the company should explore with both the consultant and the company's insurance agent.

**Trade secrets and ownership of work product.** The consulting contract should provide for general protection of the company's trade secrets with specific mention of any secrets that clearly will be involved in the work. The company typically also will want to clearly state that it will have exclusive ownership of the consultant's work product.

As an illustration of why this should be addressed, a federal court in Washington state recently held that an independent contractor who developed software for a company was not subject to the "work-for-hire doctrine," the legal rule which generally provides that an employer owns an employee's work product

The company and the consultant also should address how to protect the consultant's ability to use his knowledge in the future and whether he can work for a competitor during the life of the contract or in the future.

Many legal disputes arise from a company or a consultant seeking to poach employees from one another after the consulting relationship ends. The parties' agreement should provide for protection from the consultant soliciting its employees (and the consultant may want parallel protection) and protection from the consultant becoming a competitor or soliciting customers or suppliers in certain circumstances.

**Dispute-resolution clauses.** Many companies and consultants put standard dispute-resolution clauses in their contracts that nobody reads until there is a dispute, which can be very costly. In the Portland area, binding arbitration before the Arbitration Service of Portland, with a single arbitrator, is often the most cost-effective route to resolution. This should be written into the parties' initial agreement.

**Independent contractor or employee?** One of the appealing aspects (for employers) of hiring consultants is they are considered independent contractors. That relieves the employer of the responsibility of paying employee-related taxes or providing the consultant with employee benefits.

However, more than a label is required. The Internal Revenue Service applies a multi-factored test, and the Oregon Bureau of Labor and Industries applies two different tests. Companies should familiarize themselves with the law and applicable tests.

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