

FIRST EDITION

THE INDEPENDENT Contractor

*Understanding
the Rules
and a Model
Contract*

Jeffrey King, J.D.

For Members of the World Floor Covering Association





THE INDEPENDENT CONTRACTOR: Understanding the Rules and A Model Contract

A Primer for Members of the World Floor Covering Association

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Notice: The purpose of this alert is to review the latest developments which are of interest to clients of Mr. King. The information contained is abridged from legislation, court decisions, and administrative rulings and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel

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INTRODUCTION

The use of independent contractors is a common practice in the retail and commercial flooring industry. Yet, few areas of business have caused more confusion and problems than determining who qualifies as an independent contractor. A dealer may follow all the rules established by the Internal Revenue Service only to be audited by its state's Workers' Compensation Commission and told its independent contractors are in fact employees. It is also not uncommon for a dealer to implement all the requirements from the Workers' Compensation audit, but be told its independent contractors, who were paid under piecework rates, must be treated as employees and must be paid back overtime compensation. There is also always the threat that a terminated independent contractor will file for unemployment insurance or seek back overtime pay claiming he or she was in fact an employee, notwithstanding a contract that explicitly states that they were independent contractors.

The ability to maintain a clear and defensible distinction between independent contractors and employees is essential for minimizing the risk of misclassifying employees as independent contractors. The problem is that there is not a single all encompassing standard for defining who is and who is not an independent contractor. Not only do the standards vary between the federal and the state governments, they can often be different between the government agencies of each. Moreover, even when the same standard is used, different factors may be emphasized depending on the agency. The Internal Revenue Service, for example, is looking to make sure taxes are paid, while the Department of Labor is seeking to ensure workers are paid minimum wages and overtime under the Fair Labor Standards Act. Similarly, a state's Workers' Compensation Commission is trying to ensure workers are covered by compensation insurance while the National Labor Relations Board is looking to protect employees' rights to unionize. These different goals impact the test employed and the factors emphasized.

Compounding the problem, and in spite of the varying standards and tests, the United States Department of Labor ("DOL") and the Internal Revenue Service ("IRS") are coordinating efforts with the states to crack down on independent contractor misclassification. Under this effort, when a federal or state agency finds a misclassified independent contractor, it notifies the other federal and state agencies of its finding. The other agencies, in turn, can then begin their own audit notwithstanding the differences in the standards that may be applied by each agency.

There is no single independent contractor agreement that will insure compliance with every federal and state law, and the varying interpretations of these laws by the courts and the agencies that enforce the law. All independent contractor classification depends on the totality of the facts, and a contract is but one aspect of determining whether workers are independent contractors or employees. The flooring dealer must also develop a record showing that the independent contractor is a legitimate stand-alone business and is not an integral part of the dealer's business. Understanding the standards and taking the various precautions suggested below can minimize the risks of an independent contractor being reclassified as an employee.

To provide such guidance, this document is organized as follows:

1. Section I provides an overview of the main tests applied by federal and state agencies in determining classification status, including an explanation of the factors used on each test;
2. Section II discusses the application of these tests under specific federal statutes and provides a brief explanation of the factors considered;
3. Section III provides a brief overview of state laws that raise classification issues to provide the flooring dealer with an understanding of the diversity of the various state laws and regulations;
4. Section IV provides a summary of the key steps that a floor covering dealer should take to minimize the risk of misclassifying employees as independent contractors; and
5. Section V provides a model independent contractor agreement.

Armed with this information, the floor covering dealer or contractor can reduce its exposure to misclassification. Given the variation in state laws, however, competent legal counsel should always be consulted to ensure that you meet all the obligations in each state regarding employee and independent contractor classification.

I. SUMMARY OF LEGAL STANDARDS

To avoid liability, the floor covering dealer or contractor must be able to prove that a worker is an "independent contractor" under all of the relevant laws, including the state and federal tax codes, the federal Fair Labor Standards Act, federal and state civil rights statutes, state wage and hour laws, the state workers' compensation statutes, and state unemployment compensation regulations. The standard for determining appropriate classification status depends on the context in which the dispute arises. Although the factors utilized for determining who qualifies as an independent contractor vary considerably, the standards generally fall into three basic tests: (A) the "right-to-control" test; (B) the "economic realities" or "entrepreneurial opportunity" test; and (C) the "hybrid" test which combines the other two tests.

While a number of the factors considered under both tests overlap, the interpretation and importance of each factor varies. As generally applied, the right-to-control test tends to classify fewer workers as independent contractors than the entrepreneurial opportunity test. Accordingly, if a worker is classified as an independent contractor under the right-to-control test, he or she will most often also be considered an independent contractor under the entrepreneurial opportunity test. Conversely, if a worker is considered to be an employee under the entrepreneurial opportunity test, it is usually the case that the worker will be classified as an employee under the right-to-control test.

A. Right-to-Control Test

The right-to-control test focuses on the independence of the contractor and the amount of control the company asserts over the “means and manner of the worker's performance.”¹ The hiring company need not actually exercise control. Rather, if the employer has the right to control, the worker is more likely to be an employee. Moreover, the issue is not just control over the particular project, such as dictating where, when and how a worker is to perform his or her services. The courts and enforcing agencies also consider whether the hiring company has effective control over the independent contractor because of the financial relationship, such as an exclusive contract or owning the needed equipment to do the job.

The right-to-control test has gone by various names, including “the common law agency test”. Regardless of its name, the test considers a number of factors in evaluating the control a hiring company has over the worker. The right-to-control test is also used by the Equal Employment Opportunity Commission (EEOC) and the courts to determine whether a worker is an employee, and thus protected under the federal and state laws prohibiting discrimination based on race, gender, ethnicity, religion², disabilities³, and age.⁴ The right-to-control test is also applied in cases involving pension and healthcare coverage under the Employee Retirement Income Security Act (“ERISA”).⁵ Since only employees have rights under ERISA, the classification of a worker potentially has a significant impact on pension and healthcare benefits coverage and costs.

The basic factors considered are as follows.

1) Control

As its name implies, the right-to-control test focuses on the amount of control an employer asserts over a worker. There is no single factor that can be focused on to ensure a worker is properly classified as an employee or independent contractor, nor is there a single factor that will automatically classify an independent contractor as an employee. Rather, classification determinations under the right-to-control test require a balancing of all the factors and are therefore inherently fact-specific. The most common types of control include:

- a) Instructions: A key factor is the amount of instruction given about when, where and how the work is to be performed. An independent contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work. Accordingly, the more detailed the instruction, the more likely the worker will be classified as an employee.

¹ *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

² Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 (1964), *et seq.*

³ The Americans with Disabilities Act, 42 U.S.C. §§ 12101 (1990), *et seq.*

⁴ The Age Discrimination in Employment Act, 29 U.S.C. §§ 621 (1967), *et seq.*

⁵ 29 U.S.C. §§ 1001 (1974), *et seq.*

- b) Assigning Projects: If a flooring dealer can insist that a worker take on additional projects or can assign a particular worker to a given task, that worker is more likely to be an employee. An independent contractor has the right to refuse any project.
- c) Personally Providing Services: Generally, employees personally provide the services needed. Employees do not hire others to do their work for them. An independent contractor is able to assign another worker to do the job and need not personally perform services.
- i) Hiring and Assigning Workers: An employer has the right to hire and assign work to its employees. If the floor covering dealer insists on the independent contractor hiring certain employees or dictates which of the independent contractor's employees will work on a project, then there is a real risk that the independent contractor and its employees will all be classified as the dealer's employees. The proper way to handle ensuring a high quality job is not to dictate which of the independent contractor's employees will do a particular project, but set quality standards in the contract.
- d) Supervision: The flooring dealer will regularly supervise the work of an employee, but not an independent contractor. Rather, an independent contractor's work will usually be inspected after completion, but not regularly supervised by the dealer. Accordingly, it is not a problem if a flooring dealer hires an installer as an employee to inspect the independent contractor's work; but if the employer hires an installer to supervise the independent contractor's work, it is likely that the independent contractor will be considered an employee.
- e) Location: As a general rule, an employer has the right to mandate where its employees will work. Independent contractors ordinarily work where they choose. To neutralize this factor, the flooring dealer needs to point out that the customer, and not the dealer, determines the location. The independent contractor does not become an employee of the customer, and thus this factor should not have any impact on the dealer's classification of independent contractor. It is recommended that any work order or contract specify that the location is "determined by the customer." By using multiple independent contractors, the dealer can assign the job to a contractor that is able to work at the particular site.
- f) Work Hours: When a flooring dealer controls the particular times a worker may perform work, or the total number of hours that a worker may perform work, it is more likely that that worker is an employee. Conversely, when a worker is allowed to determine when and for how long he or she will work, it is more likely that the worker is an independent contractor. A flooring dealer may control the hours during which its facilities are open and closed for access to independent contractors. The concern is when the dealer controls the hours or specific shifts for particular workers.

A flooring dealer can set deadlines and even establish start and stop times. In addition, like location, the customer and not the flooring dealer often dictates the timing of a job. As a result, an agreement that requires the independent contractor to install flooring on specific days is not problematic if the contract covers only a

specific job. A general agreement, however, that allows the flooring dealer to dictate the hours and days for future jobs is likely to be interpreted to suggest the worker is an employee and not an independent contractor.

2) Part of The Regular Business of The Employer

An individual performing tasks that are part of the regular business or core functions of a company is more likely to be considered an employee. An individual performing tasks unrelated to the regular business of the hiring company is more likely to be an independent contractor. To avoid any confusion that flooring is separate from installation, the dealer should take the following precautions:

- a) Installation Separate Service: It is important for the flooring dealer to convince the courts and enforcing agencies that flooring can be, and is, sold without installation. The flooring dealer should keep records of any sale that did not include installation and any advertising from competitors that promote sales without installation.
- b) Separate in Invoice: It is important for the flooring dealer to separate the flooring product from the installation on any invoice.
- c) Distinguish Employee Installers: Generally, if a flooring dealer has employees that do the same job as independent contractors, then the independent contractors work is more likely to be seen as an integral part of the floor covering dealer's business and they will be considered employees. If a dealer regularly hires both employees and independent contractors to do similar work, the dealer needs to have an explanation for the practice. With an installer for example, a dealer may have carpet installers as employees, but uses independent installers who are specialists in certain types of flooring, such as hard surfaces or pattern carpet, or only when there was an unusual increase in sales.

3) A Distinct Occupation or Business.

A worker engaged in a distinct occupation or business is more likely to be an independent contractor. For example, installers and cleaners are more likely to be independent contractors than workers hired to perform general secretarial or administrative support. In addition, the more the independent contractor has the traditional aspects of a stand-alone business, such as its own offices, employees, yellow page listing, advertising and similar aspects of a business, the more likely the workers are to be classified as independent contractors.

4) Continuing Relationship

The length of the relationship will be considered. The longer the same independent contractor is used, the more likely he or she will be considered an employee. The courts and agencies generally consider that employees work for the same employer month-after-month, year-after-year. An independent contractor, in contrast, is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work. Moreover, an employee ordinarily works for one employer at a time. An independent contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule. Thus, it is

important not to have an exclusive contract with any one independent contractor, but to spread the work among multiple independent contractors.

5) Particular Skills

The more highly skilled the workers, the more likely they are to be independent contractors. Installers and cleaners are likely to be considered as having particular skills, while an individual working in the dealer's warehouse or backroom is unlikely to be considered as having unique skills.

6) Furnishing Tools and Equipment

A worker is more likely to be an independent contractor if he or she purchases and uses his or her own equipment. For example, if the flooring dealer furnishes installers with delivery trucks, power stretchers and similar equipment, the installer is more likely to be considered an employee.

7) Method of Payment

Independent contractors generally must send out invoices and are not automatically paid like employees. Moreover, payment on an hourly, weekly, or monthly basis is a factor indicating status as an employee. Payment based on a per-assignment or per-task basis is consistent with status as an independent contractor, but is never sufficient on its own. Simply paying on a piecework basis, for example, will not automatically turn an employee into an independent contractor. Since employees can also be paid on a piecework basis, it is key to have other indicators that the workers are independent contractors.

8) Employee Benefits

Only employees receive benefits such as vacation and sick leave, access to pension programs, health insurance and similar programs. If the independent contractor is provided any of these benefits, it is likely he or she will be classified as an employee.

9) Contract

Courts often consider the contractual language used by the worker and the hiring party, as well as their understanding of the nature of the work relationship, in determining whether or not a worker is an employee or an independent contractor. The contract language alone is not determinative of the status as an employee or independent contractor; however, clear contract language can be important to the defense of any classification challenge depending on the state law. For example, Georgia holds that a statement in an agreement that the relationship is an independent contractor relationship creates a presumption that such a relationship exists.⁶ In contrast, such a statement of the parties' intent under California law is just one of many factors considered by the courts and "[t]he label placed by the parties on their relationship is not

⁶ O.C.G.A. §§ 34-9-2(e)(1).

dispositive"⁷ If an employment relationship exists, it does not matter that the employee is called independent contractor.

* * *

Application of the right-to-control test will vary by agency and the particular state statutes. Similarly, the particular circumstances of an industry can affect how the various factors are applied. To illustrate, the United States District Court in New Jersey found that setting a work schedule and requiring the contractors to report to a given location at a given time was not the degree of control required to establish an employer-employee relationship under the federal Fair Labor Standards Act⁸ (FLSA). The court found that the fact that the drivers owned or leased their trucks, risked incurring a loss because they were paid on a per trip basis, and had the ability to acquire additional trucks and employ drivers was sufficient to find them independent contractors.⁹ In contrast, carpet installers were held to be employees not independent contractors because the installers worked for a single flooring company, did not advertise, and failed to bill independently for installation.¹⁰ As these matters illustrate, all the factors need to be considered.

B. The Entrepreneurial Opportunity Test

The entrepreneurial opportunity test focuses on the extent to which a worker is economically dependent on the hiring company. The entrepreneurial opportunity test is broader than the right-to-control test, which means that more workers are classified as independent contractors under this test than under the right-to-control test. Some factors, such as the amount of control the host company exerts over the worker, are the same as those in the right-to-control test. The entrepreneurial opportunity test, however, concentrates more specifically on the level of economic interdependence between the worker and the host company.

Courts apply this test to make classification determinations in disputes arising under federal wage-and-hour laws, such as the Fair Labor Standards Act ("FLSA"); federal work-safety laws, such as the Occupational Safety and Health Act¹¹ ("OSHA"); and federal leave laws, such as the Family Medical Leave Act¹² ("FMLA"). Similarly, state wage and hour boards tend to use this test.

The factors of the entrepreneurial opportunity test are set forth below.

⁷ *S.G. Borello & Sons v. D.I.R.*, 48 Cal.3d 341, 349 (1998); *CA Labor Code* § 3353.

⁸ 29 U.S.C. § 201 (1938), *et seq.*

⁹ *Luxama v. Ironbound Express, Inc. et al.*, Civil Action No. 2:11-cv-02224 (D.N.J. June 28, 2012).

¹⁰ *Aladdin Service Corporation v Department of Labor*, (1999, N.J. Appellate Court).

¹¹ 29 U.S.C. § 651 (1970), *et seq.*

¹² 29 U.S.C. § 2601 (1993), *et seq.*

1) Opportunity for a Profit or Loss

A key factor under the entrepreneurial opportunity test is the opportunity for the worker to make a profit and the risk of incurring a loss. An employee is economically dependent on the employer and is usually paid whether or not the employer made money on any particular sale. An independent contractor on the other hand controls whether there is a profit or loss from his or her work. If the independent contractor works efficiently and uses only the supplies necessary, he or she will realize greater profits.

The lack of an opportunity for a profit or loss will usually result in the worker being reclassified as an employee. On the other hand, the mere possibility of a profit or loss rarely is enough on its own to ensure a worker is an independent contractor. An employer can pay a employee on a piecework basis, for example, and the employee's opportunity for profit or loss is very real and depends largely on his or her efficiency. Simply paying on a piecework basis, however, will not automatically turn an employee into an independent contractor. Other factors, as discussed below, including who provides the workers tools and training and whether the worker has established an independent business, may indicate the worker is an employee and not an independent contractor.

2) Distinct Entity

A significant factor is also whether the independent contractor is established as a legally recognized separate business entity, such as a corporation or partnership. A court or enforcing agency will often look to a number of factors, including:

- a) Does the independent contractor have a tax identification number? A tax identification number indicates that the contractor is treating his or her business as a business entity and not a mere extension of the individual worker. On the other hand, an independent contractor that uses his or her Social Security number is less likely to have created a distinct entity.
- b) Has the independent contractor purchased insurance, including workers' compensation insurance for its employees? Having insurance will substantially impact the status of the contractor because it shows that it has its own protection from liability and has purchased protection for its employees.

Some state's workers compensation laws require that if a dealer hires an uninsured independent contractor, it must provide workers' compensation benefits. Yet, if the flooring dealer includes the independent contractor and its employees under the dealer's insurance, there is a significant risk that the contractor and all of its employees will be considered employees of the flooring dealer. In other states, such as Texas, the law specifically provides that a general contractor may agree with a subcontractor to provide workers' compensation coverage to the subcontractor and its

employees.¹³ Accordingly, it is advisable that the dealer insists that the independent contractor purchase workers' compensation insurance for him or herself and for any of his or her employees.

- c) Does the independent contractor have his or her own place of business? An independent contractor that works out of his or her home, or whose only "place of business" is a truck is more likely to be considered an employee than one with an actual office, workshop, warehouse or other facility.
- d) Is the independent contractor his company's only employee, or does he or she hire other employees? A contractor with employees is always more likely to be viewed as an independent contractor.
- e) Does the independent contractor have a business license and other licenses required under the law? If the independent contractor is working under the flooring dealer's business license, they are likely to be considered an employee, and not an independent contractor. Similarly if the independent contractor does not have its own construction, home improvement or other licenses, they are likely to be ruled an employee.
- f) Does the independent contractor operate as if it has its own business? An independent contractor that has a business telephone number, advertises its services, has its own stationery, lists itself in yellow pages or similar directories, has a website and similar aspects of a stand-alone business is more likely to be deemed an independent contractor.

3) Investment

The investment of capital by a worker is also a significant factor indicating status as an independent contractor. For example, a cleaner who makes a substantial investment in cleaning equipment, trucks, specialized tools, an office, workshop or warehouse space is more likely to be an independent contractor. However, if the hiring party provides most of the equipment and capital investment in the business, the worker is more likely to be an employee.

Simply requiring a worker to supply his or her own tools will not necessarily be considered a substantial investment sufficient to imply the worker is an independent contractor. Often the courts or auditing agency will look to see if the worker has invested in:

- a) Office/workshop/warehouse space;
- b) Multiple trucks and equipment;

¹³ As explained in Section III, however, Texas has a law that specifically provides that a general contractor may agree with a subcontractor to provide workers' compensation coverage to the subcontractor and its employees

- c) Advertising of its services;
- d) Stationery and office supplies;
- e) Hiring administrative personnel; and
- f) Similar costs customarily associated with a stand-alone business.

4) Training

Training is another investment that is considered in determining a worker's status. Employees are often trained by experienced employees or are required to take training courses. An independent contractor trains or pays for his and his employees' training, and need not receive training from the dealer. In fact it is often the training and special skills that set an independent contractor apart from an employee. Accordingly, if a dealer pays for a worker's training, the worker is likely to be considered an employee.

5) Business and Travel Expense

An employee's business and travel expenses are either paid directly or reimbursed by the employer. In contrast, independent contractors normally pay all of their own business and travel expenses without reimbursement. Such cost are generally factored into the price charged by the independent contractor. While reimbursing for the travel expenses of an independent contractor is not fatal, it is one more factor to be weighted in determining classification. Also paying for other business expenses, however, would be more troublesome.

6) Control

Similar to the right-to-control test, the greater the extent to which an employer controls the manner in which a worker performs his or her work, the more likely it is that the worker will be classified as an employee. Control is treated as an indicator of how independent the worker is.

7) Special Skill

Similar to the right-to-control test, more highly skilled workers are more likely to be independent contractors. Less skilled workers are more likely to be employees. Thus, it is often helpful if the independent contractor is certified in his field or has special training or education.

8) Duration of the Relationship

Similar to the right-to-control test, when a worker provides services for an extended period of time, that worker is more likely to be classified as an employee. This does not mean that the flooring dealer cannot continue to use a quality contractor, but it does suggest it is best to use several independent contractors rather than the same one or two every year.

9) Working For and Using Other Firms

Similar to the duration of the working arrangement, the courts and enforcing agencies consider whether the independent contractor works exclusively or near exclusively for the dealer, and whether the dealer uses multiple contractors. An employee ordinarily works for one employer at a time and may be prohibited from joining a competitor. An independent contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule. Thus, it is important not to have an exclusive contract with any independent contractor.

10) An Integral Part of the Business

An individual performing tasks unrelated to the regular business of the hiring company is more likely to be an independent contractor. A list of factors to consider was set forth under the right-to-control test in Section I.A. These factors also apply to the entrepreneurial opportunity test.

As explained in the right-to-control test, one tell-tale sign is where a dealer regularly hires workers as both employees and independent contractors to do the same work. In these circumstances, a court or auditing agency is more likely to find the work done by the independent contractor is integral to the dealer's business and ALL the workers will be considered employees. On the other hand, a good argument that the contractor is independent can be made if independent contractors possess special skills or are not used every day. For instance, a distinction can be made between employee installers and independent contractor installers if the independent contractor installers are hired only when there is a periodic increase in work or the dealer uses employees to install carpet, but hires independent contractors to install tile. The more the work of the independent contractor overlaps with the employees, the more likely the independent contractor will be classified as an employee.

11) Billing

An independent contractor should bill for its work. It is suggested that flooring dealers insist on receiving formal itemized invoices.

12) Contract

Generally separate business entities enter into contracts with each other for services and products. It is therefore important to have a contract with every independent contractor. Clear contract language is vitally important to the defense of any classification challenge.

* * *

Application of the entrepreneurial opportunity test will vary by agency and the particular state statutes. A Federal Court in Washington, D.C. stressed that the most important factor is the "entrepreneurial opportunity for gain or loss" in determining whether a worker is an independent

contractor under the National Labor Relations Act.¹⁴ The Illinois Employee Classification Act, on the other hand, looks at the corporate status of the contractor. Corporations must meet a three-prong test. For sole proprietor/partnerships, however, the statute creates a detailed twelve-factor test analyzing various aspects of the relationship between the individual performing services and the construction contractor. All twelve criteria must be satisfied to meet this exception without any "controlling factor" under the statute.¹⁵

The key is to try to establish bright-lines between the floor dealer's business and operation and that of the independent contractor. The more the independent contractor acts and appears like a stand-alone business, the more likely it will not be reclassified as an employee. It is also essential to have an arm's length agreement with the independent contractor, just as any two independent businesses would do.

C. The "Hybrid" Test

Some agencies and courts blend the right-to-work and the entrepreneurial opportunity test to create a "hybrid" test for purposes of classification. The IRS uses a hybrid test, as do a number of state agencies. In addition, it has become popular with federal and state courts when confronted with classification issues. Many state workers' compensation boards also use the hybrid test

Courts and agencies using the hybrid test do not follow a specific recipe for determining which factors to incorporate. The dominant factors from both tests (control, risk of profits and losses, and distinct and separate corporations) play the most significant role in a hybrid analysis. Because the analysis under the hybrid test is more fluid than under the other tests, the safest approach in situations where the courts could apply the hybrid test is to default to an analysis under the right-to-control test, adding the key portions of the entrepreneurial opportunity test. This standard will be stricter, but it will avoid the guesswork inherent in trying to predict an outcome under the hybrid test.

II. OVERVIEW OF THE PREVAILING TESTS: FEDERAL LAW

A. The Internal Revenue Service

The failure to classify an employee correctly can have significant financial impact. Not only is the dealer responsible for its portion of the back withholding taxes, but the IRS may also require the company to pay all back withholding taxes plus interest, even if the misclassified independent contractors have already paid their taxes. The IRS can also levy fines and press criminal charges against company officials. For unintentionally failing to withhold federal income tax, the penalty is 1.5% of the wages paid. The penalty is doubled to 3% if the employer did not file a Form 1099-MISC for the worker with the IRS. The penalty for unintentionally failing to withhold the employee's share of Social Security and Medicare taxes is 20% of the

¹⁴ *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

¹⁵ IL Comp. Stat. Ch. 820 Sec. 185/1et seq.

employee's share of the tax. The penalty is doubled to 40% if the employer did not file a Form 1099-MISC for the worker with the IRS. The employer can also be held liable for the full amount of both the federal income tax that should have been withheld for the employee, as well as the employee's and employer's share of Social Security and Medicare taxes.

The IRS formerly used what has become known as the "Twenty Factor" test. Under pressure from Congress and from representatives of labor and business, it has recently attempted to simplify and refine the test, consolidating the twenty factors into eleven main tests, and organizing them into three main groups: (1) behavioral control, (2) financial control, and (3) the type of relationship of the parties. The essential inquiry under the revised factors, however, remains whether the purported employer retains the right-to-control the method and the manner in which services are performed. If the employer retains this right, the worker is likely to be found to be an employee. If the employer does not retain this right, and instead contracts for a result, it will be able to establish independent contractor status.

1) Behavioral Control

The IRS considers the category of Behavioral Control to cover “facts that show whether the business has a right to direct and control how the work is done through instructions, training, or other means.”¹⁶ An agreement between the parties must be carefully designed to recognize the independent contractors’ discretion to determine the meaning and methods by which they accomplish the objectives contemplated by the contract. Such agreement must also avoid any hint of the right-to-control.

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include:

- a) Instructions: An employee is generally subject to instructions about when, where, and how to work. The amount of instruction needed varies among different jobs and for different industries. The following are examples of types of instructions about how to do work that can lead to classifying a worker as an employee:
 - *When and where to do the work?* Obviously, flooring dealers have to instruct an independent installer where the work is to be done and establish when the flooring can be installed. The location, however, is not the dealer’s decision, but determined by the consumer. It is important to identify the location as “determined by the customer.” To further minimize this issue, the dealer should use several installers and pick one that is available on the needed dates. If possible, the dealer should provide a range of dates when the flooring can be installed.
 - *Who supplies the tools or equipment to use?* If the dealer dictates the tools to be used, this factor will indicate the workers are employees.

¹⁶ Id.

- *Who selects workers to hire or to assist with the work?* It is essential that the contractor be allowed to select the crew or individual who will do the work. While a specific specialist can be requested from time-to-time or for special projects, the more the dealer controls which workers will do the work, the more likely all the workers will be deemed employees of the dealer.
 - *Where to purchase supplies and services?* Obviously the dealer will provide the flooring to be installed since that is its business. This can include the basic items needed for installation, such as padding, glues, stains, etc. The dealer should avoid selling to the worker any items not needed for a particular job, such as installation equipment or uniforms. While the flooring dealer can rent equipment to the worker, the price must be at market value. The more equipment provided, however, the more likely the worker will be considered an employee and not an independent contractor.
 - *What order or sequence to follow*—If the contractor is truly independent, then he or she will control how the work is done. The dealer can inspect the results and even periodically review the work in progress. But if the dealer tells the worker what to do or regularly supervises the work, the worker is more likely to be deemed an employee.
- b) Training: An employee may be trained to perform services in a particular manner. Independent contractors ordinarily are already trained and use their own methods to train their employees. In fact, it is often the independent contractor's training and skills that separate him or her from the dealer's other employees.

2) Financial Control

The category of Financial Control relates to “facts that show whether the business has a right-to-control the financial and business aspects of the worker’s job.”¹⁷ Such facts include:

- a) Reimbursing Expenses: The extent to which the worker has unreimbursed business expenses is an important factor. Independent contractors are more likely to have unreimbursed expenses than are employees. Ongoing costs that are incurred regardless of whether work is currently being performed, such as administrative and insurance costs, are especially important.
- b) The Worker’s Investment: A worker’s investment in the facilities, tools and equipment used in performing services are evaluated. Under the IRS test, however, a significant investment is not necessary for independent contractor status. On the other hand, if the dealer owns all the tools and equipment, then the dealer has control over the worker. Such control indicates the worker is an employee.

¹⁷

Id.

- c) Works for Others: The extent to which the worker makes his or her services available to other dealers in the relevant market is a significant factor. True independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
- d) Payment Method: How the business pays the worker can impact classification. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. An independent contractor is usually paid a flat fee for the job. However, it is common in some situations to pay independent contractors hourly where they have unique skills, such as restoration or repair jobs, or where there are unknown factors that may impact the work.
- e) Profit and Loss: The extent to which the worker can realize a profit or incur a loss is considered.

3) Type of Relationship

Type of Relationship category includes the following factors:

- a) Written Contract: A written contract describing the relationship the parties intended to create is probably the least important of the criteria under the IRS test. What really matters is the nature of the underlying work relationship, not what the parties choose to call it. However, in close cases, the written contract can make a difference.
- b) Benefits: Providing the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick leave, is a significant indication that the worker is an employee. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.
- c) Length of The Relationship: If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.
- d) Integral Part of Dealer's Business: The extent to which services performed by the worker are a key aspect of the regular business of the company impacts the classification. If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. As explained earlier, where a flooring dealer has employees and regularly hires independent contractors to provide the same services, the IRS is more likely to classify the contractors as employees. Essentially, such an arrangement is seen as simply a way of avoiding hiring the workers as employees and paying payroll taxes, while receiving the benefits of having them perform the work of your other employees. While there are ways to distinguish between the services of an employee and an independent contractor that do basically the same services, the more the overlap between them, the more likely the contractor will be classified as an employee.

The essential inquiry under the revised factors remains whether the purported employer retains the right-to-control the method and the manner in which services are performed, whether that is through direct instructions, financial control over the contractor, treating the worker as an employee, or effectively creating a relationship that makes the worker dependent on the dealer. If the employer retains this right, the worker is likely to be found to be an employee. If the employer does not retain this right, and instead contracts only for a specified result, it will be able to establish independent contractor status.

4) Safe Harbor Rule

The IRS provides a “safe harbor” which supplies a defense to non-payment of employment taxes in some circumstances where the dealer believed the worker to be an independent contractor. Specifically, section 530 of the Revenue Act states in part that an individual will not be considered an employee if: (1) the taxpayer treated him or her and other workers performing similar tasks as non-employees for all periods; (2) had a reasonable basis to believe the workers were not employees; and (3) filed required information and other returns consistent with that status.

- a) Consistent Treatment: The safe harbor rule applies only if the taxpayer has consistently treated all its workers performing the same work as independent contractors. Accordingly, the rule is inapplicable if the flooring dealer, for instance, has some installers that are employees and others that are treated as independent contractors. This does not mean that the dealer cannot still argue that the installers hired as contractors are in fact independent contractors. The safe harbor, however, is not likely to provide a defense to the tax audit.
- b) Reasonable Basis: A taxpayer is deemed to have had a reasonable basis for not treating an individual as an employee in various ways.
 - The taxpayer may be able to rely on prior court rulings, a letter ruling to the taxpayer, or possibly even the determinations by other agencies. While the IRS generally does not feel bound by other agency determinations, at least one court has ruled that the taxpayer’s reliance on the findings of a workers’ compensation audit conducted during the taxpayer’s early years of business created a reasonable basis for continuing to treat certain workers as independent contractors.¹⁸
 - A taxpayer can also rely on past IRS audits in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual.
 - A consistent practice over a long period of time that is consistent with the practice of similarly situated dealers can also prove a reasonable basis. For example, a flooring dealer used a survey of 41 companies that hired flooring installers to

¹⁸ *Peno Trucking, Inc.*, 296 Fed. Appx. 449 (6th Cir. 2008).

prove it was a long-standing industry practice to treat installers as independent contractors.¹⁹

- c) Filed Proper Forms: The safe harbor rule applies only if the flooring dealer filed appropriate returns and forms that are consistent with and required for independent contractors. This means the dealer gave the workers Form 1099-MISC as annual wage summaries, and never W-2s. This shows consistent treatment of the worker as independent contractor and puts the IRS on notice that the dealer is treating the workers as independent contractors.

It is important to remember that the safe harbor rule allows the dealer to avoid paying back payroll taxes on a contractor that normally would be classified as an employee. It does not mean that the IRS will not reclassify the contractor as an employee for the future. Moreover, the other federal and state agencies are not bound by the safe harbor rule or by any particular ruling of the IRS.

B. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination in employment based upon an individual's race, color, religion, sex or national origin.²⁰ Title VII is enforced by the Equal Employment Opportunity Commission (EEOC) and individuals can bring claims in federal court challenging an employer's actions as discriminatory. Courts generally do not extend Title VII to independent contractors.²¹ Accordingly, the classification of independent contractors is often a significant issue in these matters.

The EEOC and most courts apply the right-to-control test, or a derivative of that test, to determine whether an individual is an employee covered by Title VII or an independent contractor not covered by Title VII. The following factors are often considered:

1. The kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision;
2. The skill required in the particular occupation;
3. Whether the purported employer or the individual in question furnished the equipment used and the place of work;
4. The length of time during which the individual has worked;

¹⁹ *McClellan*, 900 F. Supp. 101 (E.D. Mich. 1995).

²⁰ 42 U.S.C. § 2000e-2(a)

²¹ The few courts that extend Title VII to independent contractors where a company refused to use minority employees of an independent contractor. *See Gomez v. Alexian Brothers Hospital of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983)(an employee of an independent contractor that contracted with a hospital to provide emergency medical services had standing to sue the hospital under Title VII for refusing to contract with the corporation because it employed Hispanic employees).

5. The method of payment, whether by time or by the job;
6. The manner in which the work relationship is terminated (i.e., by one or both parties), with or without notice and explanation;
7. Whether annual leave or other employee type benefits are provided;
8. Whether the work is an integral part of the business of the purported employer;
9. Whether the “employer” pays social security taxes; and
10. The intention of the parties, especially if set out in a contract.

These factors are primarily from the right-to-control test, with a focus on the worker’s skills, the benefits provided, and how the worker fits into the dealer’s business.

C. Age Discrimination in Employment Act

The Age Discrimination in Employment Act (“ADEA”) prohibits discrimination in employment on the basis of age, and is limited to individuals who are forty years of age or older.²² The ADEA does not cover independent contractors.²³ As a result, the classification of independent contractors is often contested to bring the employer’s actions within the prohibitions of this law.

Most courts utilize the right-to-control test to determine an individual’s status as a covered employee or uncovered independent contractor under the ADEA. Although no one factor is determinative, the most common factors considered are:

1. The hiring party’s right-to-control the manner and means by which the ends are accomplished;
2. The skill of the independent contractor;
3. The source of the instrumentalities and tools;
4. The location of the work;
5. The duration of the relationship between the parties;
6. Whether the hiring party has the right to assign additional projects to the hired party;

²² 29 U.S.C. §§ 623(a)(1), 631(a).

²³ Id. at § 630(f).

7. The extent of the independent contractor's control over when and how long to work;
8. The method of payment;
9. The hired party's role in hiring and paying the independent contractor's employees;
10. Whether the work is part of the regular business of the hiring party;
11. Whether the independent contractor has a stand-alone business;
12. The provision of employee benefits; and
13. The tax treatment of the hired party.

There is again a focus on the worker's skills, the benefits provided and how the worker fits into the dealer's business, as well as length of time the worker has worked for the dealer.

D. Fair Labor Standards Act

The Fair Labor Standards Act of 1938, as amended ("FLSA"), requires employees be paid minimum wages, provided meal breaks and paid for overtime. The FLSA also mandates equal pay and establishes child labor protection. The FLSA, commonly referred to as the Wages and Hours Bill, covers employees, not independent contractors.²⁴ The majority of the issues raised in FLSA audits and lawsuits involve claims that the workers are not independent contractors and are therefore entitled to minimum wages and to overtime pay. The Department of Labor estimates that up to 30% of U.S. employers misclassify workers. Employers who misclassify employees as independent contractors may find themselves liable for back wages as well as liquidated damages. Where evidence suggests misclassification was willful, the employer will be liable for more severe penalties.

Department of Labor (DOL) enforces the FLSA act. In addition, individual workers can bring actions under the FLSA for back pay, including overtime pay and pay for meal breaks. To determine whether an individual is an employee under the FLSA, the DOL uses the entrepreneurial opportunity test. Though no one factor is determinative, the courts generally consider the following factors:

1. The hiring firm's right-to-control the means and manner of the individual's work;
2. The independent contractor's investment in equipment, tools, and facilities;
3. The independent contractor's opportunity for profit or loss;

²⁴ 29 U.S.C. §§ 203, 206, 207.

4. The permanency of the relationship between the independent contractor and the employer;
5. The skill of the independent contractor in performing the work; and
6. Whether the service rendered by the independent contractor is an integral part of the purported hiring party's business.

One additional step to take to reduce the risk that independent contractors will be reclassified as employees is to have appropriate data to prove the worker is fairly paid so that reclassifying him or her as an employee would not result in additional wages. This requires periodically verifying the amount of time it takes for various tasks assigned these independent contractors. For example, if an installer is paid on a piecework basis, the dealer should periodically determine the average total man hours it takes to complete the various types of installation. As explained in Section IV, the dealer can require the independent contractor to include on all invoices an estimate of the man-hours it took to complete the job. Armed with this data, the dealer can prove that it paid a fair price to its independent contractors and reclassification is not necessary.

E. Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act of 1986 ("IRCA") mandates that employers verify the identity and eligibility of employees to work in the U.S. within the first three days of employment.²⁵ Employers are required to have workers fill out an I-9 form that declares them authorized to work in the country. Failure to comply with these requirements can result in significant fines. Companies are not required to do so in connection with independent contractors.²⁶

Immigration and Customs Enforcement ("ICE") periodically audits the I-9 forms and an employer's compliance with the requirements. An issue often arises whether a worker is an employee for whom an I-9 must be completed and retained or the worker is an independent contractor. In order to determine whether an individual is an independent contractor ICE uses the entrepreneurial opportunity test. The following factors are considered:

1. Whether the independent contractor or hiring party supplies the tools or materials;
2. Whether the independent contractor makes services available to the general public;
3. Whether the independent contractor works for a number of clients at the same time;

²⁵ 8 U.S.C. §§ 1324(a)(1)(B), 1324a(b).

²⁶ 8 C.F.R. § 274a.1(h)

4. Whether the independent contractor has an opportunity for profit or loss as a result of the labor or services provided; and
5. Whether the independent contractor directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.

To further minimize the risk that a worker will be considered an employee, the flooring dealer should contractually require that the independent contractor comply with all the requirements of the IRCA. ICE is primarily interested in ensuring the needed information is gathered and verified. By having the independent contractor obtain and verify the information, there is less risk that ICE will find the workers employees; the independent contractor already complied with the law and there is no benefit to having the flooring dealer also collect and verify the information.

F. Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (“FMLA”) requires covered employers to provide unpaid family and medical leave for its employees in certain circumstances. The Act is enforced by the DOL and by suits filed by aggrieved employees. If a worker is found to be an employee, he or she must be reinstated possibly with back pay. The act specifically provides that the term “employee” has the same meaning as the term under the FLSA.²⁷ Thus, the entrepreneurial opportunity test is used to determine employee status under the FMLA.

G. Americans with Disabilities Act

The Americans with Disabilities Act (“ADA”) prohibits discrimination on the basis of an individual’s disability, and requires employers covered by the ADA to provide reasonable accommodations in relation to the disabilities of employees and applicants for employment. The ADA covers only employees, not independent contractors.²⁸ The test utilized to determine an individual’s status as an employee or an independent contractor is the same as that used under Title VII, the right-to-control test. If a worker is found to be an employee, the employer will be liable for failing to provide appropriate accommodations and may owe back pay and damages.

III. STATE LAWS

Each state has its own laws governing workers’ compensation, wage and hour, taxation, discrimination and unemployment. These state laws generally apply only to employees. Thus, for example, a flooring dealer does not have to provide workers’ compensation to its independent contractors. Nor are flooring dealers liable for unemployment insurance for independent contractors. Likewise, overtime pay and mandatory meal breaks under wage and hour laws are not the responsibility of the dealer. If, however, it is determined that these workers were misclassified as independent contractors, the flooring dealer will be subject to these laws, be

²⁷ 29 U.S.C. § 2612(a)(1); *see* 29 U.S.C. § 203(e).

²⁸ 42 U.S.C. § 12111(5).

obligated to make any back payments due (such as employee withholding taxes, overtime pay) and often be fined for violating the laws' requirements.

The problem is that the individual state laws vary. Even the same actions will have varying results from state-to-state. Georgia's law, for example, provides that a statement in an agreement that the relationship is an independent contractor relationship creates a presumption that such a relationship exists.²⁹ In contrast, such a statement of the parties' intent under California law is just one of many factors considered by the courts and "[t]he label placed by the parties on their relationship is not dispositive"³⁰

Many states have adopted the presumption that an individual is an employee, not an independent contractor. To overcome the presumption, the employer bears the burden of proof that the individual was properly classified under the "ABC test." To be properly classified as an independent contractor, each of the three prongs of the ABC test must be fully met:

- 1) The worker is free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact;
- 2) The service is performed outside the employer's usual course of business; and
- 3) The worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.³¹

In analyzing the three criteria, the state agencies generally apply the same factors as under the right-to-control and the entrepreneurial opportunity test. Specifically, the same factors of what constitutes control under the right-to-control test will be applied to determine if the worker "is free from control and direction" Similarly, in evaluating whether a worker is "engaged in an independently established trade, occupation, profession or business," the analysis used under the entrepreneurial opportunity test is applied.

Some states modify the tests. For example, under Illinois' Employee Classification Act an individual performing services for a company is presumed to be an employee unless the employer can meet all three factors in the ABC test. The Illinois law imposes a heavy focus on the contractor owning an independent business. If the contractor is not an "independently established trade, occupation, profession or business," but a "sole proprietor or partnership," he or she will be considered an employee unless he or she can show that they are a legitimate subcontractor by meeting twelve conditions specified in the Act. The law requires, among other conditions, that the contractor make a "substantial investment of capital ... beyond ordinary tools and equipment and a personal vehicle," be "free from the direction or control over the means and manner of providing the service," provide its "services ... to the general public or the business

²⁹ O.C.G.A. §§ 34-9-2(e)(1).

³⁰ *S.G. Borello & Sons v. D.I.R.*, 48 Cal.3d 341, 349 (1998); *CA Labor Code* § 3353.

³¹ Mass. G.L. c. 149, s. 148B; N.J. R.S. 43:21-19(i)(6)(A)(B)(C); Maryland Workplace Fraud Act of 2009, 190 Md. Code Ann., Lab. & Empl. §§3-901- 3-920.

community,” and obtains all licenses. If the contractor does not meet ANY one of the twelve criteria, then he or she is deemed an employee. In addition, under the Illinois statute, companies must keep records for three years of the days and hours that their independent contractors worked.³²

Other states have adopted the ABC test, but provide alternatives. Under Maryland's Workplace Fraud Act, for example, all construction workers are presumed to be employees and not independent contractors. A business owner can rebut the presumption in two ways. First, the dealer can satisfy all three prongs of the ABC test. Alternatively, a dealer can produce detailed documents supporting the classification as an independent contractor. These documents include:

- 1) A written contract between the employer and the contractor that includes a description of the nature of the work to be performed, the method of compensation by the employer to the contractor, and an acknowledgment by the contractor of its obligation to maintain unemployment and workers' compensation insurance, as well as pay payroll taxes;
- 2) a signed affidavit by the contractor that states that it is an independent contractor and is available to work for business entities other than the employer;
- 3) a certificate of good standing for the contractor from the Maryland State Department of Assessment and Taxation;
- 4) proof that the contractor has all of the occupational licenses required by state and local authorities; and
- 5) proof that proper notice was given from the employer to the contractor regarding the implications of the classification.

Thus, the Maryland law requires documentation not required under the laws of other states.³³

Some states impose their own test. In New Hampshire, an independent contractor must meet seven criteria, including possessing a federal employer identification number, having control over the performance of the work and the time the work is performed, holding himself or herself out to be in business or is registered with the state as a business, and is not required to work exclusively for one employer.³⁴ Under Minnesota's Workers' Compensation law, independent contractors need to maintain a separate business with the individual's own office, equipment, materials and other facilities, operate under contract to perform the specific service, and can realize a profit or suffer a loss. In addition, the independent contractor must be registered with the Secretary of State and the Department of Labor and Industry where required

³² *IL Comp. Stat. Ch. 820 Sec. 185/10 et seq.*

³³ Title 3, Subtitle 9, Labor and Employment Article, Annotated Code of Maryland.

³⁴ N.H. Labor Workers' Compensation. RSA 281-A:3, VI (B).

and either have a federal employer identification number or have filed business or self-employment income tax returns.³⁵

Accordingly, there will be a unique requirement under many state laws. Moreover these laws are interpreted and enforced by the individual state's agencies and its courts. Identical language in two states' statutes may be interpreted differently. Nonetheless, there are enough common elements under all the state and federal tests for determining a worker's status to develop a general approach that will substantially comply with most standards. All the states look at:

- 1) the dealer's control over the worker;
- 2) whether the services are an integral part of the dealer's business;
- 3) whether the worker has a recognizable business, including licenses and insurance; and
- 4) whether there is an arm's length legitimate business relationship.

Even ensuring compliance with these basic common criteria, every floor covering dealer will still need to verify that it is in compliance with the unique aspects of its state's laws.

IV. KEY PRECAUTIONS

In spite of all the confusion and inconsistent rules, there are some basic steps that the floor covering dealer or contractor should undertake to minimize its risk of misclassifying an independent contractor. The first step is to have a written contract with the independent contractor. But, no matter how well written, a contract alone does not resolve the issue. The courts and enforcing agencies reviewing classification of independent contractors also look at other factors, such as evidence that the contractor is a legitimate stand-alone business and how integral the work of the independent contractor is to the dealer's business.

To minimize the risk of having a flooring dealer's independent contractors reclassified as employees, there are four basic precautions that need to be taken: (1) enter into a contract with the independent contractor that defines the terms of the agreement that are consistent with an independent relationship; (2) review your own employees to minimize or justify any overlap with the work done by independent contractors; (3) verify the independent contractor's status; and (4) develop and maintain documentation of the relationship.

A. Contract

A well-drafted contract can go a long way in validating the classification of a set of workers as independent contractors. It is recommended that the contract not be perpetual and that it be reviewed at least annually. In addition, each new job should have a contract or at least a written work order that clearly describes the work to be done.

³⁵ Min. Stat. § 181.273.

The contract should include the following terms:

1. A clear description of the independent contractor including its tax identification number, address and state of incorporation. A number of states consider the independent contractor having a federal tax identification number as proof the contractor is a legitimate business. The contract should also require the independent contractor to provide proof of its status as a corporation and that it has the appropriate state and local licenses to do business.
2. A clear description of the work to be done. The description can mandate a certain quality and that the work meets industry or acceptable standards. The dealer may enter into an annual “master agreement” and then use work orders that should set forth the specifics for each project. If this is done, the description in the master agreement should simply state that: (a) it covers a specific type of work (such as installation, cleaning or restoration) that the dealer may offer during the term of the agreement; and (b) the independent contractor, “in its sole discretion,” can determine whether to undertake the work.
3. A clear statement of the payment for the work, which generally should be predetermined and generally should not be on an hourly basis.
4. A requirement that the contractor provide an itemized invoice that includes the man-hours worked on each project.
5. A statement that the relationship is an independent contractor relationship. The contract should specifically state that the contractor understands the implications of being classified as an independent contractor.
6. The contract should state that the independent contractor will direct the operation of the Project and determine the method, means and manner of the performance of the Project, and is not an agent, legal representative, subsidiary, joint venture, partner, employee or servant of the floor covering dealer or contractor for any purpose.
7. A time table for completion, but should provide that the independent contractor will manage and be responsible for its own schedule.
8. A provision that the dealer shall identify the location of the project “as determined by the customer;”
9. A requirement that the independent contractor is responsible for all Federal, State, Social Security, Medicare, payroll and any other taxes or insurance requirements dictated by all governmental authorities.
10. The contract should provide that the independent contractor is obligated to buy all necessary insurance, including, but not limited to, General Liability, Workers’ Compensation and Short-Term Disability insurance. The agreement should also

require the independent contractor to provide certificates of insurance to verify the policies are in effect.

Some state laws do not require the purchase of workers' compensation insurance by sole proprietors or employers with only a few employees. Even when it is not required under the law, it is still very important to ensure the independent contractor purchases workers' compensation insurance for him or herself and his or her employees. Workers' compensation insurance will help avoid potential liability if the independent contractor or its employees are injured while on a job for the dealer.

11. A statement that the independent contractor and its employees, if any, shall not receive any benefits that the dealer provides or may provide for the dealer's employees.
12. A provision stating that the independent contractor shall supply and pay for all tools/supplies at its own expense.
13. An "indemnify, hold harmless, and defend" provision to protect the dealer if the independent contractor fails to perform or negligently performs any of its duties.

A model contract is provided in Section V below.

B. Employees v. Independent Contractors

A contract is not the total solution. An issue commonly raised in determining whether a worker is properly classified as an independent contractor is whether the flooring dealer has employees that do the same job. Courts and enforcing agencies often find that, if a dealer has an employee doing the same work as an independent contractor, then the work is likely integral to the dealer's business. In addition, it is often hard for the dealer to justify why he hires both employees and independent contractors to do the same type of work. The courts and enforcing agencies generally assume that the dealer is using independent contractors to avoid the benefits and protection given to employees by the various laws, and often find that independent contractors should be reclassified as employees.

If a dealer uses both employees and independent contractors to perform the same services, it is important for the dealer to have an explanation for the practice. With installers, for example, a dealer may have carpet installers as employees, but uses independent contractors for hard surfaces. Similarly, using independent contractors during certain times of the year when work increases should also provide a valid explanation. An installer hired as an employee to inspect the completed jobs of independent contractors or to assist in calculating the amount of carpet needed for a project is not doing the same work as the independent installers.

The key is to document these explanations. The dealer needs to keep records of the work given to independent contractors that support these explanations. Similarly, records need to be kept of the work done by employees to contrast to the work of the independent contractor. Such records will not only support a dealer's classification distinction, but will show the dealer took its responsibilities seriously.

C. Independent Contractor As a Business

An independent contractor that is acting as a stand-alone business is more likely to withstand scrutiny. The factors to consider include the following:

1. The independent contractor should be incorporated or otherwise registered as a business in the state and local jurisdiction.
2. The independent contractor has obtained and maintained all the necessary licenses to do business, such as any construction or home improvement contractor licenses.
3. The independent contractor has an established place of business, such as an office, workshop, or warehouse.
4. The independent contractor advertises. At a minimum, the independent contractor should be listed in the yellow pages and any local construction or home improvement contractor listings.
5. The independent contractor works for others. This can be other flooring dealers, general contractors or individuals, such as a home owner.
6. The independent contractor has one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation.

A legally formed contractor with a place of business will always be more likely to be considered an independent contractor than an unincorporated individual working out of a truck. Accordingly, the dealer should require proof that the contractor satisfies these criteria and keep a record of the verification.

D. Documentation

A number of states require a variety of documents be created and maintained. In addition, as explained above, it is important to develop and keep records that support a dealer's classification of its independent contractors. In addition, it is important to update the files to ensure the information is accurate and up-to-date.

Floor covering dealers should consider maintaining the following documents for each of its independent contractors:

1. The dealer should ask for a copy of the incorporation registration for the independent contractor if incorporated. The independent contractor should also provide copies of the documents showing it has maintained its status as a valid corporation
2. The independent contractor should provide copies of certificates of good standing showing the independent contractor is a licensed business. The dealer

should note the dates for which the certificates are valid and obtain updated certificates when needed. An easy way to do this is to ask for a copy each year.

3. The independent contractor should provide its federal tax identification number. If the independent contractor uses his or her Social Security Number, that is an indication that he or she is an unincorporated individual and more likely to be classified as an employee.
4. The dealer should have the independent contractor provide copies of all necessary licenses, such as a contractor's, home improvement and sales license. Again, the dealer should make sure the copies show the licenses are valid and up to date.
5. The independent contractor should provide original certificates of insurance showing the independent contractor has workers' compensation and other appropriate insurance. The certificates should validate that the insurance is in effect during the time the independent contractor is hired for a project. Certificates of insurance should be carefully tracked to ensure the coverage is up-to-date and maintained from year-to-year.
6. The dealer should develop a record of the hours worked by its independent contractors. Some state laws, such as Illinois, require companies to keep records of the days and hours that their independent contractors worked. These records should be used to validate that the independent contractor is being paid fairly for his or her work. It can also be used to develop a fair price for the work. This is important if the DOL or state wage and hour board audits a dealer. It can also work as a defense if a worker sues the dealer claiming he or she is due overtime as an employee because the dealer misclassified him or her as an independent contractor. These record will show the worker was paid a fair wage.
7. The dealer should insist that the independent contractor provide invoices for all its work and the dealer should maintain a billing file for each independent contractor. To obtain information on the hours worked to ensure fair payment, the dealer can require the independent contractor include the estimated man hours spent on the job and the cost of any incidental materials used. This will allow the dealer to develop the needed data for any wage and hour audits or challenges.
8. If the dealer has employees that do the same or similar work as the independent contractors, the dealer needs to keep a record of the work done by employees and the work done by the independent contractor. As explained above, these records can help explain the differences in the work each does and why the dealer needs both employees and independent contractors.

These documents should be kept pursuant to the dealer's document retention policy. Some state laws specify how long certain documents must be retained, such as Illinois, which requires companies to keep records of the days and hours that their independent contractors worked for three years. Since the IRS audits classification of employees and independent

contractors, a practical retention period is the IRS's four (4) year retention for employment records and six (6) year retention for some other documents.

V. MODEL CONTRACT

Unfortunately, there is no single contract that will insure compliance with every federal and state law and the varying interpretations of these laws by the courts and the agencies that enforce them. Moreover, all independent contractor classification depends on the totality of the facts. A base contract that takes into account the primary factors is feasible and is provided here as a model agreement between the floor covering dealer and its independent contractors.

It is lengthy to include the various criteria for determining whether an independent contractor is properly classified. In some instances, the contract will include restrictions that are not necessary. For example, the contract requires the independent contractor to purchase and verify the purchase of workers' compensation insurance. In Texas, a dealer can include the independent contractor under the dealer's policy without impacting the status of the contractor as independent. Other provisions may prove to be unnecessary or impracticable. In other cases it may not include a provision under a state law or an interpretation of that law. The model agreement, nonetheless, is a good starting point that can easily be modified to fit a dealer's unique circumstances and local requirements.

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MODEL
INDEPENDENT CONTRACTOR AGREEMENT

This agreement (the “Agreement”) is made and entered into as of [DATE OF AGREEMENT] (the “Effective Date”) between [LEGAL NAME OF COMPANY] (the “Company”), a corporation existing under the laws of the State of _____ and having its principal offices at [COMPANY'S PRINCIPAL PLACE OF BUSINESS], and [NAME OF CONTRACTOR] (the “Contractor”) a corporation existing under the laws of the State of _____ and having its principal offices at [CONTRACTOR'S PRINCIPAL PLACE OF BUSINESS] (collectively, the “Parties”).

WHEREAS, Company is engaged in the business of _____, and,

WHEREAS, Contractor has expertise in _____, and,

WHEREAS Company wishes to retain Contractor to render services in accordance with this Agreement; and,

NOW, THEREFORE, in consideration of the covenants and agreements contained herein, the parties hereto agree as follows:

1. Contractor Representations and Warranties. Beginning on the Effective Date, and remaining in effect for the duration of this Agreement, Contractor makes the following representations and warranties.
 - 1.1. That it is a corporation [or **OTHER TYPE OF LEGAL ENTITY**] in good standing under the laws of [STATE];
 - 1.2. That its Federal Tax Identification Number is [INSERT NO.], a copy of which is attached hereto as Exhibit ____;
 - 1.3. That it has all required and appropriate state and local licenses to do business and the copies of such license[s], attached hereto as Exhibit ___, are correct, accurate and up to date;
 - 1.4. That it is in full compliance with any and all laws and/or statutes applicable to the services described herein; and
 - 1.5. That it is fully authorized and empowered to enter into this Agreement, and that its performance of the obligations under this Agreement will not violate any agreement between Contractor and any other person, firm or organization or any law or governmental regulation.
2. Company Representations and Warranties. Beginning on the Effective Date, and remaining in effect for the duration of this Agreement, Company makes the following representations and warranties.

- 2.1. That it is fully authorized and empowered to enter into this Agreement, and that its performance of the obligations under this Agreement will not violate any agreement between Company and any other person, firm or organization or any law or governmental regulation; and
 - 2.2. That it is in full compliance with any and all laws and/or statutes applicable to the services described hereunder.
3. Term. The term of this Agreement shall be for one year, commencing upon the execution of this Agreement.
 - 3.1. Renewal. This Agreement may be extended upon the terms and conditions contained herein for an additional one year term upon written notice by Company to Contractor sent at least thirty (30) days prior to the expiration of the term or any renewal term and Contractor's acceptance of the extension at least five (5) days prior to the expiration of the term or any renewal term.
 - 3.2. Termination by Notice. Either party shall have the right to terminate this Agreement with or without cause, upon delivery of written notice to the other party ten (10) days before the effective date of termination. Unless otherwise agreed to in writing signed by Company and Contractor, upon termination of this Agreement, Contractor shall cease to perform any services on behalf of Company and shall forthwith return all Company property in its possession as well as all keys, codes and passes to the Premises to Company.
 - 3.3. Automatic Termination. Either Party at any time may without any liability terminate the Agreement immediately and without prior written notice upon:
 - 3.3.1. The institution by or against the other Party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of either party's debts,
 - 3.3.2. The other Party's dissolution or ceasing to do business;
 - 3.3.3. The other Party's convicted of any crime or offense, or serious misconduct in connection with performance hereunder; or
 - 3.3.4. A material breach by the other Party of this Agreement.
4. Services.
 - 4.1. Services. Subject to the terms of this Agreement, Contractor shall provide Company with the following services:

DESCRIBE ALL OF THE SERVICES CONTRACTOR IS EXPECTED TO PERFORM UNDER THIS AGREEMENT, OR OTHERWISE REFERENCE AN ATTACHMENT WHICH DESCRIBE THE SERVICES (hereinafter "Services).

- 4.2. Work Orders. During the term of this Agreement Company in its sole discretion shall determine when it will request Contractor to provide Services pursuant to this Agreement by issuing work orders. Each work order shall constitute a “Project.”
- 4.3. Acceptance. During the term of this Agreement Contractor in its sole discretion shall determine whether to provide the services for any Project.
5. Performance of Services.
- 5.1. Contractor Responsibility. Contractor shall determine the method, details and means of performing the services to be provided hereunder. Contractor will provide, at its sole cost and expense, whatever labor it deems necessary for the performance of the Services. Employees of Contractor shall be considered employees of Contractor for all purposes and under no circumstances shall be deemed employees of Company.
- 5.2. Standard of Care. Contractor agrees to undertake a reasonable standard of care in its performance of the Project as set forth in this Agreement including, but not limited to, abiding by all applicable laws, rules and regulations. Contractor agrees to report to Company immediately any information relating to any violation or possible violation of any such law, rule or regulation.
- 5.3. Contractor Conduct And Appearance. Contractor recognizes it will perform the services for Company’s customers. In the performance of the services, Contractor and its employees shall at all times act in a professional, business-like manner. Contractor's employees shall at all times be courteous and wear clean and appropriate clothing.
- 5.4. Company Rights. Company may exercise the right to inspect or stop work, make suggestions or recommendations as to the details of work and request modifications to the scope of the services to be provided hereunder.
6. Compensation.
- 6.1. Payment. The work performed by Contractor shall be performed at the rate set forth in the work orders issued by Company [**or Appendix A if contract for a single Project**].
- 6.2. Invoices. Company shall pay Contractor for Services performed by Contractor, as appropriate, upon receipt of an invoice identifying Services performed. The invoice shall state the work order number and the man hours spent on each Project.

7. Contractor's Responsibilities.
 - 7.1. Taxes. Contractor shall be responsible for and shall pay and report all federal, state and local income tax withholding, social security taxes and unemployment insurance applicable to Contractor.
 - 7.2. Workers' Compensation Insurance. Contractor shall have full and exclusive liability for the payment of Workers' Compensation premiums for all employees in every state in which Contractor is engaged in providing services to Company hereunder.
 - 7.3. Other Insurance. Contractor shall have full and exclusive liability for the payment of all other insurance as required under applicable law hereinafter imposed upon employers by any federal, state, or local law, regulation or ordinance.
 - 7.4. Equipment. Contractor shall be responsible at its expense to supply the tools necessary to provide the services described in ¶ 4.1 above.
 - 7.5. Records. Contractor shall maintain accurate, complete, and separate books and accounts according to generally accepted accounting principles, reflecting its operations on Company premises, together with appropriate supporting data and documents.
 - 7.6. Immigration Reform and Control Act. The Contractor is responsible for obtaining, verifying and maintaining all documents on all employees required under the Immigration Reform and Control Act.
8. Location and Time of Services. Contractor shall perform Services at the locations determined by Company's customers and will try to accommodate work schedule requests of the customer and Company to the extent possible.
9. Independent Contractor Status. Contractor is an independent Contractor of Company. Nothing contained in this Agreement shall be construed to create the relationship of employer and employee, principal and agent, partnership or joint venture, or any other fiduciary relationship.
 - 9.1. Contractor shall have no authority to act as agent for, or on behalf of, Company, or to represent Company, or bind Company in any manner.
 - 9.2. Neither Contractor nor any of Contractor's employees shall be entitled to worker's compensation, retirement, insurance or other benefits afforded to employees of Company.
 - 9.3. Company shall not be liable to Contractor for any expenses paid or incurred by Contractor unless otherwise agreed to in writing signed by an executive officer of Company and Contractor.

- 9.4. Contractor shall be responsible for and shall pay and report all federal, state and local income tax withholding, social security taxes and unemployment insurance applicable to Contractor.
- 9.5. Nothing in this Agreement shall be construed as giving one party to the Agreement control over the managerial practices, financial administration or personnel practices, policies or procedures of the other party.
10. Labor Relations
- 10.1. Union Contracts. Contractor shall be solely responsible for contractor's employees' terms and conditions of employment, including labor relations with any labor organization either representing or seeking to represent contractor's employees.
- 10.2. Work Stoppage. In the event of Contractor's delay or failure in performance of all or any part of this Agreement due to strike or other labor dispute, Contractor shall immediately notify Company of the nature of the condition and any action taken to avoid or minimize its effect, and Company shall have the option to: (1) suspend this Agreement for the duration of the condition and purchase or obtain elsewhere the services to be bought, obtained or furnished under this Agreement; and/or (2) when the delay or nonperformance continues for a period of at least five (5) days, terminate this Agreement at no charge.
11. Confidential Information. Contractor and his or her employees shall not, during the time of rendering services to Company or thereafter, disclose to anyone other than authorized employees of Company or use for the benefit of Contractor and his or her employees or for any entity other than Company, any information of a confidential nature, including but not limited to, information relating to: any of Company Projects or programs; the technical, commercial or any other affairs of Company; customer lists; accounts; procedures; blueprints; specifications; letters; notes; media lists; original artwork/creative; notebooks, and similar items relating to the business of Company. Contractor shall not retain any copies of the foregoing without Company's prior written permission. Upon the expiration or earlier termination of this Agreement, or whenever requested by Company, Contractor shall immediately deliver to Company all such files, records, documents, specifications, information, and other items in its possession or under its control.
12. Indemnification. Contractor shall indemnify, defend and hold harmless Company and its affiliates and their respective officers, directors, agents and employees from and against all liabilities, obligations, losses, damages, taxes, fines, penalties, claims, actions, suits, costs, charges and expenses, including, without limitation, fees and expenses of legal counsel and expert witnesses, which may be imposed upon or incurred by or asserted against Indemnities, or any of them, by reason of actual or alleged

- 12.1. Injury to or death of persons caused by Contractor (including, without limitation, customers, guests and/or employees of Contractor and employees of Contractor's contractors, subcontractors, vendors, or agents);
- 12.2. Loss, damage, destruction or delay of property caused by Contractor, including the conversion thereof, of any person or legal entity (including, without limitation, the property of Contractor and its contractors, subcontractors, vendors, agents or employees);
- 12.3. The making or issuance of any false or fraudulent receipts for services and/or giving or receiving of any false or fraudulent receipts for services by Contractor or any of its employees, agents or subcontractors;
- 12.4. The theft, embezzlement or defalcation on the part of Contractor or any of its employees, agents, or subcontractors
- 12.5. The failure of Contractor to pay for any local, state, or federal payroll taxes or contributions or taxes for unemployment insurance, pensions, workmen's compensation or social security with respect to any individuals retained or engaged by Contractor in the performance of its obligations hereunder; or
- 12.6. The violations of any law, ordinance or regulation of any Federal, State, provincial or local governmental authority by Contractor or its contractors, subcontractors, vendors, agents or employees, as a result of or arising out of the performance of any or all of the Services, or otherwise.
- 12.7. Contractor agrees to indemnify and hold harmless Company, its affiliates, and its respective officers, directors, agents and employees from any and all claims, demands, losses, causes of action, damage, lawsuits, judgments, including attorneys' fees and costs, arising out of, or relating to, Contractor's services under this Agreement. This provision shall survive the duration of this Agreement.

Contractor agrees to defend against any and all claims, demands, causes of action, lawsuits, and/or judgments arising out of, or relating to, Contractor's services under this Agreement, unless expressly stated otherwise by Company, in writing.

The provisions and obligations contained in this Section shall survive expiration or other termination of this Agreement.

13. Insurance.

- 13.1. In addition to obtaining and maintaining Workers' Compensation Insurance for all its employees, Contractor shall at all times during the term of this Agreement, maintain, at its sole cost and expense, the insurance coverage of the types and in the amounts set forth herein with companies satisfactory to Company. The insurance policy or policies providing the foregoing coverage shall name Company as an additional named insured, and shall be written by a reputable insurance Company or with an AM Best Rating of A- VII or Higher companies

authorized to transact business in the state in which the Services will be rendered, and shall provide that the insurance Company issuing such policy shall notify Company of any material alteration, non-renewal or cancellation thereof at least thirty (30) days prior thereto. Contractor shall furnish Company with a certificate or certificates of insurance prior to the commencement of the Services, a copy of which is attached hereto as Exhibit ____.

13.2. Minimum Limits of Coverage.

13.2.1. Comprehensive general liability insurance, including blanket contractual coverage for bodily injury and property damage, in the amount of \$1,000,000.00 combined single limit per occurrence;

13.2.2. Workers' Compensation Insurance in accordance with the statutory requirements for all states in which the Services are to be performed. Regardless of any exclusions permitted by governing state law, Contractor must maintain Workers' Compensation Insurance in an amount of not less than \$1,000,000.00; and

13.2.3. Comprehensive Auto Liability insurance, owned, non-owned and hired for liability, in the amount of \$1,000,000.00 combined single limit per occurrence.

14. Compliance With Laws and Standards.

14.1. Laws. Contractor and all persons furnished by Contractor shall comply, at their own expense, with all applicable federal, state, local and foreign laws, ordinances, regulations and codes, including, without limitation, the identification and procurement of required permits, certificates, licenses, insurance, approvals and inspections in performance under this agreement. Contractor agrees to provide Company, upon request, with copies of any relevant documents evidencing such compliance and further agrees to indemnify Company and its customers for any loss or damage that may be sustained by reason of any failure to comply with this section. Upon request, Contractor agrees to certify compliance with any applicable law or regulation. Contractor's failure to comply with any of the requirements of this section will be deemed a material breach of this agreement.

14.2. Standards. Contractor and all persons furnished by Contractor shall comply, at their own expense, with all applicable standards, including **[INSERT ANY APPLICABLE STANDARDS SUCH AS FOR S600 INSTALLATION]**. Contractor agrees to provide Company, upon request, with copies of any relevant documents evidencing such compliance and further agrees to indemnify Company and its customers for any loss or damage that may be sustained by reason of any failure to comply with this section. Upon request, Contractor agrees to certify compliance with any applicable standard. Contractor's failure to comply with any of the requirements of this section will be deemed a material breach of this agreement.

15. Miscellaneous Provisions

- 15.1. Notices. All notices or other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given or made if hand delivered, mailed from within the United States by certified or registered mail, or overnight mail, or sent by recognized courier, i.e. Federal Express:

(i) if to Company, in care of: **[INSERT NAME AND ADDRESS]**

(ii) if to Contractor, in care of: **[INSERT NAME AND ADDRESS]**

or to such other address as any such party may have designated by like notice forwarded to the other party hereto. All notices, except notices of change of address, shall be deemed given when mailed and notices of change of address shall be deemed given when received

- 15.2. Governing Law and Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of **[JURISDICTION STATE]** without reference to any principles of conflicts of laws, which might cause the application of the laws of another state. Any action instituted by either party arising out of this Agreement shall only be brought, tried and resolved in the applicable federal or state courts having jurisdiction in the State of - **[JURISDICTION STATE]**. EACH PARTY HEREBY CONSENTS TO THE EXCLUSIVE PERSONAL JURISDICTION AND VENUE OF THE COURTS, STATE AND FEDERAL, HAVING JURISDICTION IN THE STATE OF **[JURISDICTION STATE]**.

- 15.3. Attorneys' Fees. If either Contractor or Company shall obtain legal counsel or bring an action against the other by reason of the breach of any covenant, provision or condition hereof, or otherwise arising out of this Agreement, the unsuccessful party shall pay to the prevailing party reasonable attorneys' fees, which shall be payable whether or not any action is prosecuted to judgment. The term "prevailing party" shall include, without limitation, a party who obtains legal counsel or brings an action against the other by reason of the other's breach or default and obtains substantially the relief sought, whether by compromise, settlement or judgment.

- 15.4. Waiver of Rights. A failure or delay in exercising any right, power or privilege in respect of this Agreement will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

- 15.5. Binding Agreements; Not Assignable. Each of the provisions and agreements herein contained shall be binding upon and inure to the benefit of the personal representatives, heirs, devisees, successors and assigns of the respective parties

hereto; but none of the rights or obligations attaching to either party hereunder shall be assignable.

- 15.6. Entire Agreement. This Agreement, and the other documents referenced herein, constitute the entire understanding of the parties hereto with respect to the subject matter hereof, and no amendment, modification or alteration of the terms hereof shall be binding unless the same be in writing, dated subsequent to the date hereof and duly approved and executed by each of the parties hereto.
- 15.7. Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.
- 15.8. Headings. The headings of this Agreement are inserted for convenience and identification only, and are in no way intended to describe, interpret, define or limit the scope, extent or intent hereof.
- 15.9. Merger of Prior Agreements and Understandings. This Agreement contains the entire understanding between the parties relating to the transaction contemplated by this Agreement. All prior or contemporaneous agreements, understandings, representations and statements, oral and written, are merged in this Agreement and shall be of no further force or effect.
- 15.10. Modifications. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each instance signed on behalf of each party,
- 15.11. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 15.12. Assignment. The Agreement and all of the terms, conditions and provisions hereof shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto; provided, however, that no assignment of all or any portion of this Agreement by Contractor shall be effective without the prior written consent of Company. All services provided by subcontractors of Contractor shall be deemed services provided by Contractor.
- 15.13. No Waiver. The failure to enforce at any time any of the provisions of this Agreement or to require at any time performance by the other party of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or to affect the validity of this Agreement, or any part hereof, or the right of either party thereafter to enforce each and every such provision in accordance with the terms of this Agreement.

15.14. No Third Party Rights. This Agreement is intended to be solely for the benefit of the parties and Company and is not intended to confer any benefits upon, or create any rights in favor of, any person other than the parties and Company.

15.15. Modification or Amendment. No amendment, change or modification of this Agreement shall be valid unless in writing signed by the parties hereto.

16. **THE PARTIES HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE CONFIDENTIALITY AGREEMENT.**

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have each executed this agreement as of the Effective Date.

Contractor

By: _____

Name: _____

Title: _____

Company

By: _____

Name: _____

Title: _____