

LAW OFFICES OF MARK PESTRONK, P.C.  
THE TRAVEL LAW OFFICE  
910 SEVENTEENTH STREET, N.W.  
SUITE 800  
WASHINGTON, DC 20006

-----  
(202) 833-1900  
Fax (202) 315-3677

MARK PESTRONK  
(DC AND VA BAR)

EMAIL:  
mark@pestronk.com

TO: MAST OWNERS' SUMMIT ATTENDEES

SUBJECT: INDEPENDENT CONTRACTORS: WHAT YOU REALLY NEED TO KNOW

DATE: JUNE 7, 2011

---

**What We'll Cover**

This seminar is about what I call the "Dark Side," to quote a "Star Wars" term. It does not make for pleasant reading. My palms begin to sweat just thinking about the terrible legal trouble that travel agency owners can get themselves into. When it comes to independent contractors, here are the two big categories of legal pitfalls:

- Independent contractors can be a source of legal liability to suppliers and clients when, as sometimes happens, they cause debit memos or other debts, disappear with clients' money, or otherwise leave agencies on the hook. We will call this the "**Liability Problem**".
- Taxing authorities can re-classify your independent contractors as employees, making you liable for their income taxes, Social Security and Medicare taxes, unemployment insurance, and workers' compensation. We will call this the "**Reclassification Problem**".

In this seminar, we will learn to prevent each problem to the extent possible and to ameliorate it when it occurs.

On the following pages, you will find useful checklists, a clear explanation of the IRS' standards, and a sample independent-contractor agreement that incorporates the advice I give you today.

**Checklist 1: Before Retaining the IC**

- Obtain full employment history.
- Verify at least two business references.
- Verify personal identification
- Interview the applicant in person.
- Process a credit check. Directions on obtaining a credit check can be found at:  
<http://www.bankrate.com/brm/news/biz/tcb/20020911a.asp>

- Require the IC to get E & O insurance.
- Obtain signed IC agreement with notarized signature, and contact the notary.

### **Checklist 2: During the Relationship**

- Require your ICs to follow the credit card approval, imprint and signature requirements in Section 8.4 of the ARC handbook.
- Require that all checks be made payable to your agency and not to the IC.
- Make sure checks clear before issuing travel docs.
- Have trusted employee review all tickets and other bookings before issuing travel docs.
- Review IAR data and void suspicious tickets.
- Enforce your contract!

### **Checklist 3: Once a Problem Arises**

- Get a clear right to set off ADMs from compensation.
- Get a personal guaranty from corporate IC.
- If you suspect fraud, notify supplier before travel, although it probably won't help.
- Explain your corrective action to the supplier.
- Offer to work with FBI or Secret Service.
- Offer to help catch other bad guys.
- When all else fails, plead poverty.

### **Checklist 4: Other Liability Problems Besides Fraud**

- When IC starts, avoid liability to old host for transferred bookings.
- When IC leaves, keep your commission on transferred or cancelled/rebooked sales.
- Don't let IC sign contracts in agency's name.
- Don't let business cards and letterhead give impression that IC is an employee.
- Don't let ICs use airline booking websites.
- Balance your need to control behavior with IRS' prohibition of behavioral control.

### **The IRS Standard Straight From the Horse's Mouth**

#### **IRS Topic 762 - Independent Contractor vs. Employee**

*"To determine whether a worker is an independent contractor or an employee under common law, you must examine the relationship between the worker and the business. All evidence of control and independence in this relationship should be considered. The facts that provide this evidence fall into three categories – Behavioral Control, Financial Control, and the Relationship of the Parties.*

**Behavioral Control** covers facts that show whether the business has a right to direct or control how the work is done, through instructions, training, or other means.

**Financial Control** covers facts that show whether the business has a right to direct or control the financial and business aspects of the worker's job. This includes:

- *The extent to which the worker has unreimbursed business expenses*
- *The extent of the worker's investment in the facilities used in performing services*
- *The extent to which the worker makes his or her services available to the relevant market*
- *How the business pays the worker, and*
- *The extent to which the worker can realize a profit or incur a loss*

**[Facts of the] Relationship of the Parties** covers facts that show how the parties perceive their relationship. This includes:

- *Written contracts describing the relationship the parties intended to create*
- *The extent to which the worker is available to perform services for other, similar businesses*
- *Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay*
- *The permanency of the relationship, and*
- *The extent to which services performed by the worker are a key aspect of the regular business of the company*

*For more information, refer to Publication 15-A (PDF), Employer's Supplemental Tax Guide, or Publication 1779 (PDF), Independent Contractor or Employee. If you want the IRS to determine whether a specific individual is an independent contractor or an employee, file Form SS-8 (PDF), Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding."*

#### **To Complicate Matters, The IRS Has Two Exceptions to the Rule**

The "Safe Harbor" Test can apply if: (1) You have not treated the worker as an employee for any period of time and do not treat workers in similar positions as employees; (2) All federal returns required to be filed (including 1099s) consistently treat the worker as an independent contractor; and (3) You have a reasonable basis for not treating the worker as an employee.

The "Direct Sellers" Law, which courts have interpreted it in such a way that all at-home agents selling leisure travel can be classified as independents, regardless of the control you exercise over how and when they work!

### **INDEPENDENT CONTRACTOR AGREEMENT**

**THIS AGREEMENT** is made and entered into as of the last date written at the end hereof, by and between \_\_\_\_\_ Agency, Inc., a \_\_\_\_\_ corporation (hereinafter referred to as "Agency"), and the person or company whose full legal name appears at the end hereof (hereinafter "Contractor").

**WHEREAS**, Contractor engages or desires to engage in the sale of travel services to Contractor's clients; and

**WHEREAS**, Contractor desires to be retained by Agency as an independent contractor to share Agency's commissions on sales of travel services to Contractor's clients;

**NOW, THEREFORE**, in consideration of the mutual promises, provisions, and covenants contained herein, the parties agree as follows:

**1. TERM AND TERMINATION:**

A. The term of this Agreement will be one (1) year from the last date written at the end hereof and will automatically be renewed from year to year thereafter, unless one party gives the other at least thirty (30) days' written notice of non-renewal. In addition, either party may terminate this Agreement at any time on thirty (30) days' written notice to the other party. No residual compensation will be remitted following termination, except for commissions and fees received by Agency during the term hereof. Following termination, Contractor's duties under Sections 3, 6, and 7 below will still be in effect.

B. Notwithstanding the foregoing, Agency may terminate this Agreement for cause, which shall mean a disloyal, dishonest, or illegal act, or Contractor's failure to achieve a mutually agreed upon performance standard, after thirty (15) days' written notice and opportunity to cure. Notwithstanding anything in this Agreement to the contrary, Agency may terminate this Agreement immediately on notice to Contractor, if Contractor intentionally violates airline reservation or ticketing rules. If this Agreement terminates for cause, then no further compensation will be owed to Contractor effective upon the date of termination, but Contractor's duties under Sections 3, 6, and 7 below will still be in effect.

**2. EQUIPMENT, SUPPLIES, AND EXPENSES:**

A. Agency shall provide Contractor with GDS access.

B. Contractor shall pay all costs of doing business, including the costs of supplies and equipment.

**3. FUNDS AND RESPONSIBILITIES:**

A. Contractor shall obtain payment for airline tickets, tours and cruises before Agency Travel or Contractor issues any tickets or other travel documents. For credit card sales, Contractor shall obtain a signed corporate profile with a power of attorney for corporate clients, a signed and imprinted Universal Credit Card Charge Form for individual clients in Contractor's area, or a signed credit card authorization plus a copy of the front and back of the card for other clients.

B. Contractor shall not deposit client funds in Contractor's bank account. Rather, Contractor shall remit all client checks directly to Agency.

C. Contractor shall not sign, consent to, or state that Contractor is authorized to sign or consent to, any contract on behalf of Agency, and shall not sign any paper on behalf of Agency.

D. Contractor's business cards shall state that Contractor is an independent contractor of Agency. Contractor shall use Agency's name on other business forms and advertising only after obtaining Agency's prior written consent to such use.

E. Contractor shall be liable for all non-payment, chargebacks, and debit memos pertaining to Contractor's business, and Contractor shall discharge these liabilities pursuant to Section 4.D. below.

F. Contractor shall indemnify, hold harmless, and defend Agency from and against all claims by Contractor's clients, employees, and suppliers arising out of or in any way related to Contractor's activities. In the event of such a claim, Contractor shall also reimburse Agency for all legal expenses in defense thereof.

#### **4. COMPENSATION OF CONTRACTOR:**

A. Within fifteen (15) days after the end of each month, Agency shall pay Contractor \_\_\_% of Agency's Revenue (defined as base commissions, fees, and point-of-sale overrides, minus Contractor's share of recalled commissions and refunded fees) received during the preceding month on Sales for which Contractor provides all counseling, reservations, and changes. For groups, Revenue shall mean commissions, fees, and markups minus the direct expenses of the group, and Revenue shall be deemed received during the month during which Agency has closed the accounting for the group.

(i) If Agency handles any counseling, reservations, or changes for clients covered by this paragraph, the foregoing percentage shall be reduced to \_\_\_%.

(ii) For calls to Agency's after-hours service by clients covered by this paragraph, Agency shall deduct a fee of \$\_\_ per call.

(iii) If Contractor fails to invoice as required by Agency or perform other work required by Agency's accounting department, Agency shall deduct a fee of \$\_\_ per invoice.

B. "Sales" shall mean airline, hotel, car rental, rail, cruise, tour, and insurance for Contractor's clients, for which Agency has been paid in full and has received Revenue during its previous month. "Sales" shall include groups but only after the president of Agency provides written approval of the group contract before the contract is signed.

C. With each monthly payment, Agency shall provide a report showing how the payment was derived. Contractor shall submit all disputes and questions concerning the report within fifteen (15) days thereafter; otherwise, Contractor shall be deemed to have waived any dispute concerning the report. From any payment to Contractor, Agency may deduct amounts owed by Contractor or Contractor's clients. If, following such deduction, Contractor still owes money to Agency under this Agreement, Contractor shall pay the balance due within 30 days after receiving Agency's invoice. If, after said 30-day period, Contractor still owes money to Agency under this Agreement, Contractor hereby authorizes Agency to charge Contractor's credit card (listed at the end hereof) for any amounts due under this Agreement.

#### **5. REDUCED RATE TRAVEL:**

A. Contractor shall not accept any free or reduced-rate travel offers directly from suppliers, if such offers are extended directly to Contractor as a result of Contractor's affiliation with Agency, unless the president of Agency has provided approval for such acceptance.

B. Contractor must meet IATAN requirements annually in order to apply for and renew an IATAN card.

**6. CONTRACTOR'S LEGAL STATUS:**

A. General

The parties intend that Contractor shall be an independent contractor and not an agent or employee of Agency. Agency is interested only in the results obtained under this Agreement. The manner and means by which Contractor performs its duties shall be under Contractor's sole control. Notwithstanding the foregoing, Contractor shall use Agency's standard invoicing format so that data may be tracked in Agency's back-office system.

B. Standards

Contractor shall adhere to all laws and ethical standards applicable to travel agencies and shall perform in a manner consistent with general accepted procedures of the industry. If Contractor sells to Californians, Contractor shall obtain its own California Seller of Travel registration if any of the following applies: (i) Contractor is a partnership, limited liability company, or corporation; or (ii) Contractor accepts service fees from clients.

C. Taxes

Contractor shall be responsible for the payment of all taxes arising out of Contractor's performance of duties under this Agreement, including without limitation, federal, state, and local income taxes. Contractor shall obtain Contractor's own employer identification number from the IRS and shall report it to Agency before receiving any compensation under this Agreement. Contractor also agrees to comply with any state employment and workman's compensation laws applicable to his employees. In the event any taxing authority determines, notwithstanding the terms of this provision, that Contractor shall be treated as an employee of Agency for such purposes, Contractor shall be liable for and agrees to protect, defend, and indemnify Agency from and against all such taxes that may be due from or payable by Agency as a result of such determination.

D. Benefits

Contractor shall not be entitled to any benefits, except as set forth in Section 5 above.

E. Place and Time of Work

Contractor shall not be required to maintain set hours, work any set number of hours in any week. Contractor shall not work at Agency's location.

F. Service for Others

Contractor is free to seek out business opportunities, advertise, maintain a visible business location and be available to work in the relevant market.

G. Training

Contractor will not expect to receive any training by Agency and will be expected to perform under this Agreement based on Contractor's own methods and skills. Contractor will be required to pay for any trade seminars or "fam trips" which Contractor attends.

H. Assistants

Contractor may delegate sales responsibilities to persons chosen by Contractor (the "Assistants"). The Assistants will be hired and supervised by Contractor. All costs relating to employing the Assistants, including but not limited to social security payments, unemployment insurance payments, and workers compensation payments, will be the sole responsibility of Contractor.

**7. RESTRICTIONS:**

A. Confidential Information

Contractor agrees that during the period of this contract and at all times thereafter, he will not disclose any of Agency's proposals or proposal content, client and prospect lists or names, or client profiles to any person or outside organizations (other than the entity for which any such materials are developed) and will not utilize any such material or information to compete in any way with Agency.

B. Restrictive Covenants

All clients for whom Agency has paid compensation under Section 4.A. above shall be regarded as the clients of Contractor upon termination of this Agreement, and all other clients for whom Agency has performed any work during the term of this Agreement shall be regarded as clients of Agency upon termination of this Agreement. During the term of this Agreement and for a period of one (1) year after the termination of this Agreement for whatever reason, neither party shall (i) handle, or assist any other person or entity to handle, travel business from any person or entity which is then or, which has been within one (1) year prior to the date of such solicitation, a client of the other party; (ii) influence or attempt to influence any such client not to do business with the other party; (iii) interfere in any way with the other party's relationships with any of its clients, employees, or independent contractors; or (iv) transfer reservations from Agency to another travel agency or to a supplier directly or assist any client in canceling any reservation made through Agency.

Moreover, Contractor hereby represents to Agency that he is not subject to any constraints, restrictions, or other legal or contractual impediments to or prohibitions against Contractor entering into this Agreement (such as covenants not to compete, covenants not to solicit, nondisclosure agreements, and any other restrictions on competition) arising in connection with Contractor's relationship or association with any person or entity whether as an independent contractor, employee, or otherwise.

C. Restricted Access

During the term of this Agreement, Contractor shall refrain from using Agency's GDS system to access any record other than reservations for Contractor's clients and profiles made by Contractor. After termination of this Agreement, Contractor shall refrain from using Agency's GDS system, ARC number, or name.

**8. MISCELLANEOUS**

A. This Agreement contains the entire agreement by and between the parties, relative to the business arrangement provided for herein. No amendment, waiver or discharge of any provision of this Agreement shall be effective against any party unless that party shall have consented thereto in writing.

B. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns.

C. No failure or delay in exercising any rights or remedies pursuant to this Agreement shall constitute a waiver of any other right or remedy pursuant hereto. Resort to one form of remedy shall not constitute a waiver of other available remedies.

D. A ruling by any court that one or more of the provisions contained in this Agreement is invalid, illegal or unenforceable in any respect shall not affect any other provision of this Agreement. Thereafter, this Agreement shall be construed as if the invalid, illegal or unenforceable provision had never been included, but only within the jurisdiction of the court making the ruling.

E. If suit is brought to enforce any of the provisions of this Agreement, then the prevailing party shall be paid by the other party all of the prevailing party's costs and expenses of prosecuting and/or defending the suit, including, without limitation, the reasonable attorneys' fees, court costs and expenses of the prevailing party.

F. The parties hereby agree that the courts in \_\_\_\_\_ County, \_\_\_\_\_, shall be the exclusive forum for all litigation related to this Agreement. Contractor hereby consents to the personal jurisdiction of said courts.

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the last date written below.

[Signatures lines here.]

Contractor's credit card number: \_\_\_\_\_. Exp: \_\_\_\_\_. CCV: \_\_\_\_

**PERSONAL GUARANTY**

In the event that Contractor is a corporation, partnership, or limited liability company, the undersigned individual(s) hereby personally, jointly and severally, guarantee each and every obligation of Contractor to Agency under this Agreement.

[Guarantor Signature Lines Here]