HIRING A THIRD PARTY DEVELOPER

Critical Questions For The Entrepreneur Before Engaging Or Hiring a Third Party Developer as an Employee or Independent Contractor

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Determining the nature of the relationship status between hired workers and employers can have significant consequences for employers engaging third party developers. It is common for independent contractors and employees to work side by side at the same company doing similar work. While in many respects, there seems to be no difference between employees and contractors, there are important legal differences. Before engaging someone to work on your project, take some time to consider basic employment issues such as, works for hire, confidentiality, the employee relationship, third party developers, and wage and hour issues. Defining the relationship properly ahead of time will prevent headaches and later difficulties.

The first consideration is determining whether you are hiring an employee or an independent contractor. Employees are entitled to many protections under the law that independent contractors do not have such as a salary, eligibility for unemployment compensation, workers' compensation benefits for any workplace injury, coverage under federal and state wage and hour laws, and protection from workplace safety and employment and anti-discrimination laws. Many start-up companies do not have the capital to hire enough employees, so they want to contract out work to save resources.

So how do you determine the status of the relationship and avoid an employee relationship if desired? The independent contractor status can be difficult to define. It is defined by common law principles, the Fair

Labor Standards Act (FLSA), and by court decisions. The IRS and most states define the independent contractor status by adopting common law principles. Much of the focus will relate to the level of control the employer has over the service or the product, and by the method of compensation. Other critical components to consider include:

1. Who supplies the equipment or materials;
2. Whether the work is temporary or permanent:
3. Whether the worker controls hours of employment indicating independent contractor status;
4. If the worker can choose not to come to work without fear of losing employment; and
5. Whether the employer supplies all necessary materials.

If the worker is deemed to be an employee, there are wage and hour issues under state and federal law the employer must consider. Employers must pay state and federal unemployment tax, social security tax, and workers compensation/disability premiums to a State Insurance Fund for all employees. The hiring party is not required to make any of these payments for independent contractors. Incorrect classification of the relationship can leave the employer liable for past taxes. In addition, employees enjoy FLSA protections related to minimum wage, meal breaks, and overtime. These protections are often increased by state and local laws.

Works for Hire

Another consideration for a third party developer relates to "works for hire." This is a doctrine created by U.S. Copyright Law. Typically, the creator of the work is considered the author and therefore, the owner of the work. However, under the work for hire doctrine, the employer is usually considered the owner of the work as long as the work is done by an employee on company time with company resources. As a side note, this is not true for patentable inventions which would need to be assigned to the company by the employee. A work created by an independent contractor can be a work made for hire only if (a) it falls within one of the nine categories of works under section 101 of the Copyright Act **and** (b) there is a written agreement between the parties specifying that the work is a work made for hire. When contracting for services from a third party independent contractor, the employer will want to execute a contract that includes the appropriate work for hire language **before** the work is prepared.

Confidentiality

Finally, the confidentiality of company secrets and information must always be considered before **any** information is shared with anyone, including employees. Non-disclosure or Confidentiality Agreements should be specifically tailored to the information disclosed. There are additional federal and state trade secret protections available which are useless if not employed properly. Employers should take every precaution before sharing business secrets with employees and independent contractors. A good intellectual property attorney can tailor an outline specific to protecting your company's business.