

LRC Research Training

Contract Drafting Spring 2021

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Finding sample contracts & guidance



Your client—a local cleaning company—is planning to offer on-demand disinfecting services via a new mobile app. To that end, they've identified a software developer they'd like to hire as an independent contractor to write the program. They've asked you to draft the terms of this agreement.

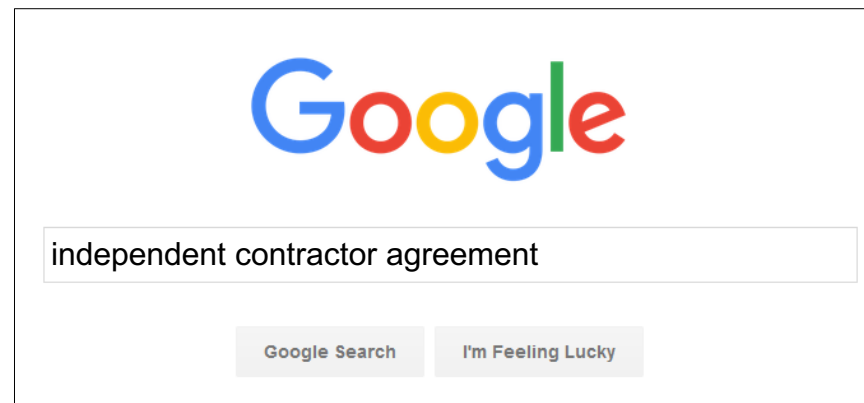
You've never written such a contract before and don't know how to get started.

Where to begin?

Finding sample contracts & guidance

A common scenario:

- You are asked to draft a brand new contract or clause
- You have never written a contract like the one you have been asked to draft
- You might be tempted:



You get what you pay for

Fee-based sources of forms/sample contracts and guidance

- Bloomberg Law (forms & analysis)
- Lexis Practical Guidance (forms & analysis)
- Thomson Reuters (Westlaw)—
Practical Law (forms & analysis)
- CEB OnLaw Pro (CA-specific; forms & analysis)
- Other fee-based legal websites
(often include forms only)

Quality free sources

- State websites have free forms (but no analysis)
- Print books at the LRC (and other law libraries) have forms and analysis

Issues to think about

- Author/creator
- Age of materials
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Considering all the M&A deals you've worked on in the past 18 months, which parties or advisors have typically been tasked with creating the first drafts of each of the following?

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independent contractors 517668 Bloomberg Law Practical Guidance Consulting Letter Agreement (Annotated) Consulting Letter Agreement (Annotated) **Editor's Note:** In this Consulting Letter Agreement, a company engages a consulting firm and its principal for strategic or advisory consulting services. This form agreement does not contemplate the provision of engineering, artistic or other services that would require consideration of intellectual property ownership.

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independent contractors Pro-Consultant Consulting Agreement (Annotated) Pro-Consultant Consulting Agreement (Annotated) **Editor's Note:** This sample agreement is a consultant-favorable business-to-business contract for the provision of consulting services. In addition to having favorable pricing and termination terms, consultant-friendly consulting agreements are typically drafted to make the client share liability arising from the contract with the consultant.

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Bloomberg Law Practical Guidance **Independent Contractor Agreement** **Independent Contractor Agreement** **Editor's Note:** This agreement can be used when a corporate client seeks advice about retaining independent contractors and avoiding employee-status claims. Plaintiff's counsel also can use this model to compare with an agreement that a client might have been asked to sign.

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Employment, Sample Agreement - Independent Contractor Agreement

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Independent Contractor Agreement

Editor's Note: This **agreement** can be used when a corporate client seeks advice about retaining **independent contractors** and avoiding employee-status claims. Plaintiff's counsel also can use this model to compare with an **agreement** that a client might have been asked to sign. Additional or different terms can be added depending upon the client's goals and protected interests. Always check state law to determine if additional or different terms are required. See also **Checklist: or Employee?**

*This document was contributed by **Kevin P. Hishta**, a shareholder in **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**'s Atlanta office.*

ARTICLE I: PARTIES AND TERM OF AGREEMENT

1.01. This **Independent Contractor Agreement** ("**Agreement**") is entered into by and between [*insert company name and address*] ("**Company**") and [*insert contractor name and address*] ("**Contractor**"), an **independent contractor**, this _ day of __, 20__ in consideration of mutual promises made herein as follows:

KEYWORDS **independent contractor agreement**

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void, or unenforceable by a court of competent jurisdiction, the remaining provisions nevertheless will continue in full force without being impaired or invalidated in any way. The parties fully agree that if any of the provisions herein shall be deemed to exceed the maximum restrictions which a court of competent jurisdiction would deem enforceable, then such court may, to the extent permitted by law, modify and enforce such restrictions to the extent found reasonable and enforceable under applicable law.

7.07. Governing Law. This **Agreement** is governed by and construed in accordance with the laws of the State of *[insert name of state or commonwealth]*.



Practice Pointer: Consider forum selection clause.

7.08. Merger. This **Agreement** shall not be terminated by the merger or consolidation of Company into or with any other company.

7.09. Arbitration. Any controversies arising out of the terms of this **Agreement** or its interpretation shall be settled in accordance with the rules of the American Arbitration Association, and the judgment upon award shall be entered in any court having jurisdiction thereof.

Practice Pointer: The pros and cons of binding arbitration need to be evaluated. Alternatively, consider a mediation provision.

7.10. Limitation of Damages. Neither **Contractor** nor the Company shall be liable to the other for, and each party expressly waives, any consequential, incidental, special, exemplary or punitive damages.

7.11. Legal Compliance. **Contractor** agrees to comply with all laws, statutes, regulations, and ordinances applicable to **Contractor**'s business and the work performed hereunder.

Practice Pointer: Consider jury trial waiver.

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1 ☐**Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues** 68

Non-jurisdictional | Practice Notes

... LLP This practice note will help you determine the legitimacy of **independent contractor** status for the worker at issue and assist you in drafting and negotiating a defensible **independent contractor agreement**. An effective **independent contractor agreement** will both withstand judicial and regulatory scrutiny of **independent contractor** status and provide a practical framework for the parties' relationship. Consider ...

... key issues we address below to draft and negotiate an effective **independent contractor agreement**:...

Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues This practice note will help you determine the legitimacy of **independent contractor** status for the worker at issue and assist you in drafting and negotiating a defensible **independent contractor agreement**. An effective **independent contractor agreement** will both withstand judicial and regulatory scrutiny of **independent contractor** status and provide a practical framework for the parties' relationship. by ...

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... determination of whether a worker is characterized as an employee or **independent contractor** hinges on control. The more a Client controls a **Contractor**, the more likely an employee/employer relationship exists instead of a client/**independent contractor** relationship. The determination of whether a worker is properly classified as an employee or an **independent contractor** faces different scrutiny and has different considerations in other labor areas ...

... ensure compliance with applicable law. For additional guidance, see Supply of Services **Agreements** Resource Kit. For more information on California's **independent contractor** laws and classification issues, see **Independent Contractors** State Practice Notes Chart. For state-specific **independent contractor agreement** forms, see the **Independent** ...

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This **agreement** for performance of services ("Agreement") is made on [date] (the "Effective Date"), between [name of person or firm engaging **independent contractor**'s services] ("Client"), with a



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Article I. **SERVICES TO BE PERFORMED BY CONTRACTOR.**1.1. **Specific Services.**

Contractor, acting independently and not as an employee of Client, agrees to [describe in detail services to be performed].

– Drafting Note

Drafting Note to First Paragraph of Specific Services

The best **agreements** cover a specific project. If a **Contractor** is going to work on different projects upon completion of an initial assignment, then those should be outlined in a separate **agreement**. The more projects a **Contractor** works on or the longer the engagement, the more the **Contractor** is likely acting as an employee. The Services can also be set forth in an attachment to the **Agreement**, as provided in the Alternate Clause to Section 1.01. However, before drafting the **Independent Contractor Agreement**, you should analyze the issue of **independent contractor** status under the various federal and state law tests to ensure your **agreement** adequately supports an **independent contractor** classification, and minimize the possibility that a court or administrative agency would recharacterize the worker as an employee.

For more information, see [Independent Contractor Tests and Risks of Worker](#)



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1. Independent Contractor/Consultant Agreement (Pro-Client)

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An independent contractor agreement between an individual contractor and a client company for consulting or other services. This Standard Document is drafted in favor of the client company and is based on federal law. State and local law may impose different or additional requirements on independent contractor classification and agreements. For...

...State and local law may impose different or additional requirements, including language that must be included in independent contractor agreements. Companies engaging independent contractors should consider applicable state and local law with this Standard Document. For more information on state law requirements for independent contractors, see Independent Contractors: State Q&A Tool and Independent Contractor...

...Independent contractors can provide a significant financial benefit to a company in part because independent contractors are not entitled to many of the rights and protections available to employees (see Practice Note, Independent Contractor Classification: Benefits of Engaging Independent Contractors). This is also the reason, however, that the DOL, the IRS, state and local agencies, and the courts often construe independent contractor...

2. Independent Contractor/Consultant Agreement (Pro-Client) (CA)

Standard documents

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California

A California-compliant independent contractor agreement between an independent contractor (a self-employed individual) and a client company for consulting or other services. This Standard Document is drafted in favor of the client company. This Standard Document has integrated notes with important explanations and drafting tips.

...While independent contractors generally have no legal duty to maintain the confidentiality of the company's information, the company should consider including contractual confidentiality obligations in the agreement to protect confidential information the contractor may have access to or develop during their engagement by the company. (In some cases, depending on the work the independent contractor performs, the contractor may be subject to confidentiality requirements unrelated to the agreement...

...Section 1 should generally contain provisions that support the worker's status as an independent contractor, as appropriate for the particular engagement (see Drafting Note, Independent Contractor Status). Independent contractor agreements should include provisions that satisfy the ABC test, or if applicable, one of its exceptions. For example, with the business-to-business contracting exception, the contracting business must satisfy both the Borello test and the criteria set forth in the exception (Cal. Lab. Code § 2776). For more information, see Drafting Note, Read This Before Using Document...



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Independent Contractor/Consultant Agreement (Pro-Client) (CA)

by Practical Law Labor & Employment

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A California-compliant **independent contractor agreement** between an **independent contractor** (a self-employed individual) and a client company for consulting or other services. This Standard Document is drafted in favor of the client company. This Standard Document has integrated notes with important explanations and drafting tips.

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[Start drafting](#)Note: [Read This Before Using Document](#)[**INDEPENDENT CONTRACTOR** NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[DATE]

Dear [**INDEPENDENT CONTRACTOR** NAME],

This letter **agreement** (this "**Agreement**") sets forth the terms and conditions whereby you agree to provide certain services (as described in Schedule 1) to [CLIENT COMPANY NAME], with offices located at [ADDRESS], a [STATE OF ORGANIZATION] [ENTITY TYPE] (the "**Company**").

1. Services.

1.1. The Company engages you, and you accept such engagement, as an **independent contractor** to provide



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Read This Before Using Document

This **independent contractor** or consultant **agreement** is a short-form letter **agreement** between an individual **independent contractor** and a client (assumed to be a corporate entity in this document) for consulting or other services. It is drafted in an informal letter format and may be appropriate for a short-term engagement or specific project.

This Standard Document assumes that the service provider is properly classified as an **independent contractor** and is not an employee of the client company.

On September 4, 2020, Governor Newsom signed [A.B. 2257](#) into law effective immediately. A.B. 2257 repeals A.B. 5's [Section 2750.3 of the California Labor Code](#) and both adds several new ABC test exceptions and revises certain pre-existing exceptions, including those for business-to-business contracts, referral agencies, and freelance writers and editors ([Cal. Lab. Code §§ 2775 to 2787](#)). For more information, see:

- [Practice Note, Legal Tests for Independent Contractor Classification Under California Law: A.B. 2257 Significantly Amends A.B. 5.](#)
- [Drafting Note, Use Employment Counsel to Customize Independent Contractor Agreement.](#)
- [Drafting Note, California Tests for Independent Contractor Classification.](#)

This Standard Document also assumes that the **independent contractor** is not a labor **contractor** providing workers to the client employer to perform labor that is within the usual course of the client employer's business, which would subject the labor **contractor** and client employer to the requirements of [Section 2810.3 of the California Labor Code](#) (for more information, see [Legal Update, California Law to Make Companies Liable for Employment Violations of Independent Labor Contractors](#)).

This Standard Document is intended for the engagement of an individual **independent contractor**. The individual may have organized their business as a sole proprietorship or [limited liability company](#) (LLC), for example, and may have hired or engaged employees or **contractors** to assist in providing services, but they are treated as an individual for purposes of this **agreement**. For a professional services **agreement** between two business entities, see [Standard Document, Professional Services](#)

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[INDEPENDENT CONTRACTOR NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[DATE]

Dear [INDEPENDENT CONTRACTOR NAME],

This letter **agreement** (this "**Agreement**") sets forth the terms and conditions whereby you agree to provide certain services (as described in Schedule 1) to [CLIENT COMPANY NAME], with offices located at [ADDRESS], a [STATE OF ORGANIZATION] [ENTITY TYPE] (the "**Company**").

1. Services.

1.1 The Company engages you, and you accept such engagement, as an **independent contractor** to provide certain services to the Company on the terms and conditions set forth in this **Agreement**.

1.2 You shall provide to the Company the services listed on Schedule 1 (the "**Services**").

1.3 The Company shall not control or direct the manner or means by which you [or your employees or **contractors**] perform the Services[, including but not limited to, the time and place you perform the Services]. [The Services performed are outside the usual course of the Company's business.] [You are customarily engaged in an independently established trade, occupation, or business of the same nature as the Services performed.][LIST ANY OTHER CRITERIA TO SHOW **INDEPENDENT CONTRACTOR** STATUS]

1.4 Unless otherwise stated on Schedule 1, you shall furnish, at your own expense, the materials, equipment, supplies, and other resources necessary to perform the Services. [The Company shall provide you with access to its premises, materials, information, and systems to the extent necessary for the performance of the Services.]

1.5 You shall comply with all [third-party access] rules and procedures communicated to you in writing by the Company, including those related to safety, security, and confidentiality.

Note: [Services](#)

2. Term. The term of this **Agreement** shall commence on [[DATE]/as of the date set forth above] and shall continue

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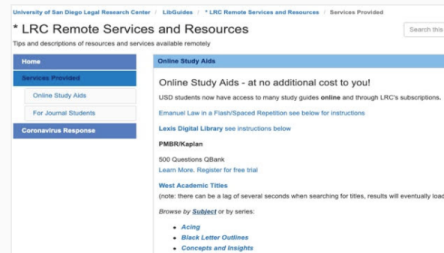


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New Year, New Laws: Items of Note for Trust and Estate Practitioners

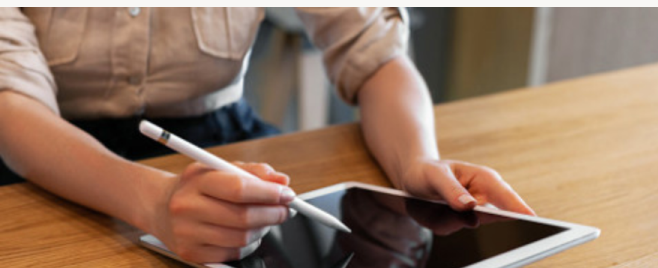
Bruce A. Last January 19, 2021

The new year brings new rules and tools for the trust and estate practitioner. While procedure and practice aren't quite as thrilling as groundbreaking changes to case or statutory law, they can make a huge difference to the practitioner. Accordingly, here are some items of note for trust and estate...

The Danger of Refreshing Recollection

Julie Brook January 15, 2021

Sometimes a witness needs documents to refresh his or her recollection. This can lead to a tough choice for attorneys. There's a big downside to letting your witness review a document while testifying: The opposing attorney may be entitled to receive copies of documents used to refresh recollection...



Using E-Signatures While Doing Business Remotely

Jon Pfeiffer January 15, 2021

In the era of the coronavirus pandemic, even as businesses



Law Alerts

ALL...

Alex Padilla Appointed to Vacant California U.S. Senate Seat, Shirley Weber to Secretary of State

Katherine Proctor January 19, 2021

Gov. Gavin Newsom on Monday formally appointed Alex Padilla, California's secretary of state, to fill the state's U.S. Senate seat vacated by Vice President-elect Kamala Harris. To fill the secretary of state post vacated by Padilla, Newsom nominated state Assemblymember Shirley Weber (D-San Diego)...

For Employees Who Work Rotational Schedule, Both "On" and "Off" Weeks Count Against FMLA Leave Entitlement, Ninth Circuit Holds

Matt Mandelbaum January 19, 2021

The Ninth Circuit on Friday issued an opinion holding that the term "workweek" as used in the Family and Medical Leave Act (FMLA) includes, for employees who work a rotational schedule, both the employee's on and off weeks. Thus, an employer may insist that when such employees take continuous FMLA leave,...

New Bill Could Make Law Against Racial Discrimination in Criminal Cases Retroactive

Nate Jackson January 19, 2021



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in Internet Law and Practice in California

§17.38 I. Form: Social Media Influencer Independent Contractor Agreement

Comment: If the Social Media Influencer Independent Contractor Agreement is directly with an individual talent, as opposed to a media agency, then this release is not necessary.

This Statement of Work ("SOW") is entered into as of the date of the last signature below (the "SOW Effective Date") by and between _ _ [name of company] _ _ ("Company") and _ _ [name of consultant] _ _ ("Consultant"), and is subject to the terms of the Social Media Influencer Independent Contractor Agreement entered into by the parties on _ _ [date] _ _ , 2020 ("Agreement").

PRACTICE GUIDES

in Working With Independent Contractors, Leased Workers, and Outsourcing

STEP 30. Draft Agreement Between Principal and Independent Contractor

AGREEMENT BETWEEN PRINCIPAL AND INDEPENDENT CONTRACTOR

Draft an agreement that increases the defensibility of an independent contractor relationship:

PRACTICE GUIDES

in Internet Law and Practice in California

§4.19 D. Form: Independent Contractor Consulting Agreement

INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

Comment: See §4.21 for a form of independent contractor nondisclosure agreement.

PRACTICE GUIDES

in Drafting Employment Documents for California Employers

§4.33 I. Form: Preamble, General Conditions

INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

This Independent Contractor Agreement (hereinafter "Agreement") is made as of _ _ [date] _ _ , between _ _ [contractor's name] _ _ , an independent contractor ("Contractor"), and _ _ [principal's name] _ _ ("Company").



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4 Human Resources

Internet Law and Practice in California



PRINT

§4.19 D. Form: Independent Contractor Consulting Agreement

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INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

This Independent Contractor Consulting Agreement (this "Agreement") is made as of __[date]__, between __[name of company]__, a __[specify entity, e.g., California corporation]__ ("Company"), and the person or entity identified as "Consultant" on the signature page of this Agreement ("Consultant").

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. SERVICES. Company hereby retains Consultant to perform the following services (the "Services"): __[List or describe services as specifically as possible. The services can be more specifically described in an attached exhibit if necessary.]__

Comment: The description of the services should be as precise as possible and should avoid the use of general terms such as "and such other services as may be added from time to time" or "such services as directed by the appropriate employees of Company" to lessen the risk of potential reclassification of the independent contractor as an employee.



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- Employment Damages and Remedies
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Meredith Snyder

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Amanda S. Paquet

[3 Employment Contracts](#)

Margaret Hart Edwards

Daniel J. Cravens

Michael Pedhirney



BOOKS & TREATISES

Books



Kenneth A. Adams, *A Manual of Style for Contract Drafting* (4th ed. 2017); LRC Reading Room [KF807 .A33 2017](#)

Lenné Eidson Espenschied, *Contract Drafting: Powerful Prose in Transactional Practice* (3d ed. 2019); LRC Reading Room [KF807 .E84 2019](#)

George W. Kuney & Donna C. Looper, *Legal Drafting in a Nutshell* (5th ed. 2021); available electronically via [West Study Aids](#)

Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. 2014); LRC Reserve Study Aid [KF807 .S73 2014](#)

Treatises and practice guides

David C. Burgess et al., *Drafting Business Contracts: Principles, Techniques, & Forms* (revised 2019); LRC Reading Room [KF801 .D72](#); also available electronically via [CEB OnLaw Pro](#)

Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2019, [Westlaw](#))

Vladimir R. Rossman & Morton Moskin eds., *Commercial Contracts: Strategies for Drafting & Negotiating* (2020, [Westlaw](#))

Peter Siviglia, *Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating* (2019, [Westlaw](#))

Tina L. Stark ed., *Negotiating and Drafting Contract Boilerplate* (2019, [Lexis](#))

Final thoughts



- Don't start from scratch—there are many resources that can provide starting points.
- Google is not a great starting point for contract drafting.
- Contact a reference librarian for help!

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