

This is a *sample* Memorandum of Agreement. Independent contractors *may* find this to be a useful tool.

When you perform services under your independent contractor certification, you are acknowledging that you are engaged in an independently established business. When working as an independent contractor, if you are hurt on the job, you are not entitled to workers' compensation, and if the job ends and you are out of work, you may not use your independent contractor earnings to qualify for unemployment insurance. Other rights, such as wrongful discharge and wage protection statutes do not apply to you as an independently established businessperson. Additionally you are responsible for reporting your income and paying your own taxes, including state and federal income tax, Social Security and Medicare.

Experience indicates that a major source of controversy between contractors and their clients is a misunderstanding of the working relationship. Disagreements may also arise over such things as to what work is to be done, when it is to be accomplished, how it is to be accomplished, and the price to be paid for the service performed.

The Montana Department of Labor and Industry offers the following Memorandum of Agreement as a sample format to use when contracting to perform work on a project. This sample agreement is geared to construction, and use for other types of services will require some customization. There is no requirement that you use this format. The sample Memorandum of Agreement illustrates the basic elements of a good contract. As the old saying goes, "an ounce of prevention is worth a pound of cure". A good, written Agreement up front, will help avoid problems down the line between you and your customer.

4. Payment will be made as follows:

The contract price, which is the exact dollar amount the contractor will be owed at the completion of all work, should be listed in the contract. A payment schedule that parallels the amount of work completed, with “retention” (a percentage of each payment or of the total job which the hiring agent will retain until the job is completed) should be outlined in the contract.

5. A statement that all required building permits and variances required by your city, state, and county will be obtained by the contractor (or a statement that the building permits will be handled by the homeowner) before work is started.

6. Insurance that is required.

The Agreement should include a guarantee that the contractor carries general commercial liability insurance (with installation floater and builders risk) and has either Workers’ Compensation Coverage or an Independent Contractor Exemption Certificate.

7. Clean-Up of debris, wood, nails, etc.

A statement of what cleanup and removal of debris and materials will be done by the contractor and other instruction regarding pets, children or areas where materials may not be stored should be included so both parties know who is responsible for what.

8. A right to cancel clause.

Detailing the time frame in which either the contractor or hiring agent may cancel after the contract has been signed along with any penalties that the contractor or hiring agent may incur when canceling after work has begun.

8. Request references.

Two or three references should be listed by the contractor and the hiring agent would be wise to follow-up with the references and ask about quality, timeliness, cleanliness, etc.

9. A statement of Warranty on the work.

The contractor should be explicit about whether labor and materials are guaranteed and for how long and include the names and addresses of the parties that will honor the warranties.

- A. It is understood by the contractor and the hiring agent that their relationship is not that of employee to employer. Contractor acknowledges and understands that provisions of law, including workers' compensation, unemployment insurance, wage and hour as well as all applicable taxes are the responsibility of the contractor and not the hiring agent.
- B. The contractor has supplied the hiring agent with a copy of the contractor's relevant and current independent contractor certification or construction contractor certification as recognized by the State of Montana, Department of Labor and Industry, a copy of which is incorporated as part of this Agreement.
- C. The Hiring agent acknowledges and understands that in order for the contractor to work as an independent contractor the hiring agent may not exercise control (some indicators of which are on the back) over the manner and detail in which the work is

performed. The hiring agent shall be concerned only with the delivery of the finished product within the timeframes agreed to by the parties.

- D. The hiring agent recognizes that when the hiring agent exercise control over the contractor an employment relationship may exist.
- E. The Contractor works in an independently established trade, profession or occupation only when the contractor is free from control by the hiring agent in all ways other than as to delivery of a finished product in the timeframes agreed to by the parties with payment to be made as agreed by the parties.

SIGNING THIS DOCUMENT WILL COMMIT YOU TO CERTAIN LEGAL RESPONSIBILITIES. IF YOU HAVE ANY QUESTIONS YOU SHOULD CONSULT WITH AN ATTORNEY.

Dated this _____ day of _____.

Hiring Agent

Independent Contractor

Independent Contractor Contracting authority

The Montana Supreme Court has stated the following four factors are indicators of control in a working relationship:

1. Evidence of control, which includes the right to control;
2. the furnishing of equipment;
3. the method of payment; and
4. the right to fire without liability.

The consideration given to each of these factors is not a balancing process. One can be determined to be an employee simply by the strength of one of these factors. Conversely, all of the factors must demonstrate the contractor's independence in order for a contractor to be an independent contractor.

Here are some common things to think about when determining control:

- Payment is on a time basis rather than on a bid or project completion basis.
- The pay is determined by the hiring agent, as opposed to the contractor or subcontractor submitting a bid establishing the cost for the project.
- The hiring agent provides substantial tools and equipment necessary to perform the job functions as opposed to the contractor or sub-contractor providing their own tools and equipment. The hiring agent instructs what tools to use and how to use them.
- The hiring agent oversees how the work is performed as opposed to the contractor sub-contractor working the project in the manner and means he/she sees as appropriate.
- The hiring agent explains, shows, and/or trains the contractor or sub-contractor how to perform the work. If the contractor receives extensive instructions as how work is to be done, this suggests an employee relationship.
- The hiring agent can release the contractor or sub-contractor from the job without notice or the opportunity to fix the problem. When the working relationship can be terminated without liability the hiring agent has the control.
- When there is then no opportunity for profit or loss for the contractor or sub-contractor, the worker does not have control.
- The hiring agent requires a log of time the contractor or sub-contractor works on the job is an indication the hiring agent has control.