

# Answers to 5 Most Frequently Asked Questions from Contractors

*presented by*

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November 9, 2016



# Introduction

## 5 Legal Questions Frequently Asked by Contractors

- How should I structure my business?
- What questions can I ask potential new employees in an interview?
- How should I classify employees?
- What language should I use in contracts?
- What do I need to know about contractor liens and the courts?

# Business Structures

- You may operate your business under any one of several organizational structures. Each type of business structure has certain advantages and disadvantages that should be considered.

- **Sole Proprietorship** – one individual or married couple in business alone

*Pros:*

- Simple to form and operate
- May enjoy greater flexibility of management, fewer legal controls, and fewer taxes

*Cons:*

- Business owner is personally liable for all debts incurred by the business

# Business Structures (cont.)

- **General Partnership** – composed of two or more persons (usually not a married couple) who agree to contribute money, labor and/or skill to a business
  - Each partner shares the profits, losses, and management of the business
  - Each partner is personally and equally liable for debts of the partnership
  - Formal terms of the partnership are typically contained in a written partnership agreement

# Business Structures (cont.)

- **Limited Partnership** – composed of one or more general partners and one or more limited partners
  - The general partners manage the business and share in profits as well as losses
  - Limited partners share in the profits of the business, but their losses are limited to the extent of their investment (i.e., limited partners are generally not personally liable for the debts of the limited partnership)
  - Limited partners are usually not involved in the day-to-day operation of the business
  - Formal terms of the limited partnership are typically contained in a written limited partnership agreement
  - Limited partnerships have not been commonly utilized since the advent of limited liability companies

# Business Structures (cont.)

- **Corporation** – a more complex business structure
  - Shareholders own the capital stock of the corporation.
  - Shareholders elect directors to manage the corporation.
  - The directors appoint officers to oversee the day- to-day operation of the business.
  - A sole individual may form a corporation.
  - Generally, shareholders, directors, and officers are not personally liable for the corporation's debts.
  - Doing business as a corporation may also yield tax or financial benefits.
  - Corporations may be formed for profit or nonprofit purposes.

# Business Structures (cont.)

- **Limited Liability Company (LLC)** – a business structure in which members own the membership units of the LLC
  - An LLC can be managed by one or more members or managers (a manager need not be a member).
  - A sole individual may form an LLC.
  - An LLC is similar to a corporation in that its members and managers are generally not personally liable for the debts of the LLC.
  - Formal terms of the LLC are typically contained in a written operating agreement.
  - Compared to corporations, LLCs are more flexible in that owners (i.e., members) can create specific terms for management, distribution of profits and losses, and other LLC matters. LLCs are permitted to engage in any lawful, for profit business or activity other than banking or insurance.

# Employees

- Employee vs. Independent Contractor
  - It is becoming increasingly high risk to have anyone classified as an independent contractor:
    - Independent contractor status is strongly disfavored and under increasing scrutiny.
    - The default worker status is “nonexempt employee”
    - Employer must meet a high burden to claim an independent contractor.
    - Generally, to be an independent contractor:
      - it must state so in a contract
      - the worker must have a UBI number
      - be allowed to compete
      - be free from control of boss, etc.
      - be free to do work on their time
      - Be free to complete their project without specific direction from Employer as to exactly how
      - They should provide their own tools



# Employees (cont.)

- Exempt vs. Non-exempt Employees
  - Default is non-exempt – must pay overtime (1.5x) (cannot waive)
  - Exceptions - employee is exempt. Fair Labor Standards Act lists exemptions. Most common are white-collar: admin, exec, professional, etc.
  - Exemptions are narrowly construed and employer must prove they are correctly classified

# Employees (cont.)

- Overtime
  - 1.5x regular pay (or more)
  - Cannot waive
  - WA State - Employee can request “comp time” or “exchange time” at 1.5 rate, but federal law does not allow it.

# Employees (cont.)

- Minimum Wage

- Statewide: \$9.47 (going to \$11 in 2017)

- In Seattle

- Large employer (501+ employees)

- 2016: \$13/hour (\$12.50 if payment toward medical benefits)

- 2017: \$15/hour (\$13.50 if payment toward medical benefits)

- 2018: \$15.36 (\$15/hour if payment toward medical benefits)

- Small Employer (500 or fewer employees)

- 2016: \$12/hour (\$10.50)

- 2017: \$13/hour (\$11.00)

- 2018: \$14/hour (\$11.50)

# Employees (cont.)

- Minimum Wage (cont.)

- Exemptions/Exceptions/Miscellaneous

- 14- and 15-year-olds may be paid 85%
    - May not use tips when calculating whether a worker gets minimum wage
    - Some jobs are exempt, like some seasonal workers, farm workers, and casual workers such as babysitters
    - Some cities require paid sick time if more than four employees – varies
    - Recent new law in Seattle – creates private COA; employees may sue employer for alleged violations of the paid sick and safe time, minimum wage and wage theft ordinances. Double damages, attorney's fees and civil penalties up to \$5,000.
    - An ounce of prevention is worth a pound of cure

# Employees (cont.)

- Hiring - What questions to ask and what questions not to ask (SMC 14.17)

Subject	Fair Pre-Employment Questions	Unfair Pre-Employment Questions
Age	Birth date and proof of age	Inquiry implying a preference for people younger than 40
Arrests/ Convictions – complicated	Arrest alone -not a reliable indicator of criminal behavior. Conviction = disparate impact. Focus on whether charges are pending, dismissed or if there was a conviction, and only if the crime asked about relates to job duties, and within last ten years. Exceptions exist	See us
Citizenship	Whether employee can provide proof of legal right to work here after hire/is applicant prevented from lawful employment due to immigration or visa status	Whether the applicant is a citizen. Nationality, birth place, ancestry

# Employees (cont.)

Subject	Fair Pre-Employment Questions	Unfair Pre-Employment Questions
Family	Whether applicant can meet work schedule or has commitments that may prevent him from meeting attendance requirements	Spouse, spouse's gender, employment or salary. Children, child care arrangements, dependents
Disability	Can applicant perform essential job functions (with or without reasonable accommodation)	Nature, severity, extent of disability, need for accom, whether applicant has received workers comp. Any inquiry that is not job related
Height and weight	Very limited. Only if being of certain height/weight is a business necessity	Any inquiry not based on actual job requirements and not consistent with business necessity
Marital status Race Gender	None	Is app married, divorced, same sex spouse, what race gender, sexual orientation, gender identity
Photographs	May request after hire for ID purposes	Can't ask for mandatory or optional photo before hire
Pregnancy	Inquiries as to anticipated absences from the job, made to male and female alike	Whether applicant is pregnant. All questions relating to pregnancy, due date, etc.

# Employees (cont.)

- Firing
  - At will; need not have a reason, but cannot have a discriminatory reason (unless they have a contract which requires termination for cause)
  - Thoroughly document the performance issues or business needs that motivated an adverse employment action
  - Seek legal advice before taking adverse employment action
  - Be truthful
  - Don't need to give extensive details
  - If employee requests a reason, give it in writing within a reasonable time (i.e., ten days)

# Employees (cont.)

- Performance Evaluations
  - Goals
    - Help employees improve
    - Fulfill employee expectations that they will receive feedback
    - Receive the employee's feedback
    - Create evidence of performance issues
    - Evaluations are a valuable opportunity to communicate with employees – take advantage of it



# Employees (cont.)

- Performance Evaluations (cont.)

- Do's

- Do base evaluation on objective (not subjective) standards
    - Do document and include concerns and problems
    - Do allow for employee feedback
    - Do consider all past performance since last review, not just most recent

# Employees (cont.)

- Performance Evaluations (cont.)

- Don'ts

- Don't surprise employees
    - Don't include old (before prior review) issues
    - Don't make significant and unplanned decisions during review
    - Don't ignore problems – favorable or neutral reviews can create problems later

# Employees (cont.)

- Miscellaneous Employment Issues
  - Non-compete agreements
  - Employee manuals – should you have one? What should be in it?
  - Hiring international workers – see us

# Liens and the Courts

- What is a mechanics or materialmens lien?
  - It is a security interest in real property for the benefit of those who have supplied labor or materials for the improvement of that property
  - Contractor liens are governed by RCW 60.04
  - The rule: “any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished...”

# Liens and the Courts (cont.)

- Are landscapers entitled to a lien?
  - A landscape designer is likely providing professional services for the improvement of real property, so most work will support a lien
  - Generally landscaping projects that include improvements are considered a “permanent benefit”
  - *Legault v. Suncoast Lawn Serv., Inc.*, 486 So. 2d 72 (Fla. Dist. Ct. App. 1986)
  - Lawn service or other maintenance generally is not an improvement within the lien statutes

# Liens and the Courts (cont.)

- What does a lien get you?
  - A lien gets you paid
  - It is, once perfected, recorded against the title to real property
  - Paid if owner sells – must remove the lien
  - Paid if contractor sues – court can order the sale of the property to satisfy the lien

# Liens and the Courts (cont.)

- How do you go about perfecting a lien?
  - Pre-lien notice requirements
    - Everyone must provide notice to the owner and general contractor, unless they fall within a specific exception
    - Generally, two categories: catch all and improvement of owner occupied residential property
    - Improvement of owner occupied - generally must give notice if not contracting directly with the owner
    - Catch all - commercial, new construction – notice not required if not contracting directly with the owner, claims for labor only, subs who contract with the prime contractor
    - Purpose is to balance and protect those who provide labor and materials, but also protect owner from claims by someone not authorized to do work
    - Timing generally protects work done for 60 days before the date of the notice (and beyond)
    - Exception - 10 days for new single family residence

# Liens and the Courts (cont.)

- Recording a lien – strict timing requirements
  - Within 90 days after you last furnished labor, services, materials or equipment
  - Where - County auditor's office (in King County, it is called the Office of Records and Elections)
  - Service on owner within 14 days
  - Technical requirements for contents – see us
- Foreclosing a Lien
  - Superior court for the county where the property is located
  - Strict timing once again – eight months from filing of lien



# Liens and the Courts (cont.)

- State court options – for other lawsuits, not lien foreclosure
  - Small claims court – up to \$5,000. Can be individual or business. Does not involve attorneys.
  - District Court – up to \$100,000
  - Superior Court – all
  - Mandatory arbitration: \$50k or less, money judgment only, other requirements
  - Length of lawsuit varies. In Superior Court trial date is about a year away. Federal court is about a year, but can vary.
  - Cost of lawsuit varies, and depends highly on how it is fought. Attorneys can provide a range of fees. Sometimes insurance may cover if business is sued.

# Liens and the Courts (cont.)

- Mediation
  - Required in most State Superior Court and Federal Court cases
- Arbitration
  - Contractual
  - Can be better in some cases
  - Binding, generally there is no right to appeal

# Contracts

- Statute of frauds – RCW 62A.2-201
  - A writing is required for enforcement of a contract not to be performed within a year; contract for the sale of goods for the price of \$500 or more
  - Writing must be signed by party against whom it is to be enforced

# Contracts (cont.)

- Common boilerplate contract clauses can have an impact
  - Arbitration
  - Attorney's fees
  - Venue
- Finding documents online
  - It is important to consider specific needs, and be careful when searching online as some are better than others

# Contracts (cont.)

- General rules
  - It is a good idea to:
    - have your contract in writing
    - be detailed as to the terms of payment and performance
    - READ a contract before you sign it
    - consult your attorney if you still have a question

# Conclusion

This presentation is intended to give an overview of common questions and answers for a variety of areas related to your business. Because each situation is different, this information is intended for general information purposes only and is not intended to provide legal advice on any specific facts and circumstances.



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YOU



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