

INDEPENDENT CONTRACTORS VS. AGENTS OR EMPLOYEES

Although laws for imposition of legal liability vary from state to state, the derivative liability of one party ("A") for the wrongful acts of another party ("B") often turns upon the question of whether party B is the agent or employee of party A. If party B, in the course and scope of his employment or agency, commits a wrongful act that causes damage to a third-party, party A may be required to shoulder the burden of that liability under the doctrine of *respondeat superior*: legal Latin for "Let the master answer."

The other side of this coin is the case where party B is *not* the agent or employee of party A. The term "independent contractor" is often used in many states to describe a relationship where party B performs service at the instance of party A, but is not party A's agent or employee. Importantly, party A may be shielded from *respondeat superior* liability for party B's conduct if party B is indeed determined to be an independent contractor. A key factor is the extent to which party A directs the specifics of party B's performance.

Unfortunately, in cases where party B's status as employee or independent contractor may be disputed, the determination may be a "gray issue" rather than a black or white one, that only a factfinder, such as a jury, can truly decide. Each case will turn on its own facts, and those facts will vary. So no lawyer or insurance agent in the land will be able to say whether a particular party B is definitively an independent contractor, as opposed to an agent or employee, until such a factual determination is eventually made. An extra complication results from the nuances of the law on this subject as it varies from state to state. So this educational article, and the form which follows it, are not and should not be considered legal advice.

If you are party A and hoping to shield yourself from liability for party B's conduct, you want to create strong documentation to support party B's independent contractor status. The form Performance Agreement/Contract for Sub-Contractors shown below is offered as an illustration for educational purposes only to exemplify how party A Contractors (such as manufactured home retail dealers) might try to contract with party B Sub-Contractors (such as transporters or installers of manufactured homes) to create an opportunity to urge the independent contractor defense. Be aware that having such an Agreement does not assure that party B will be found to be an independent contractor, nor does the absence of such an Agreement preclude successful invocation of party B's independent contractor status. Furthermore, this example form is not necessarily appropriate for your particular situation, and you need advice of counsel for your particular state to meet your individual needs after an attorney-client relationship is established. In Texas, you might consider calling upon **Wells & Cuellar, P.C.**, **Attention: D. Brent Wells**, www.wellscuellar.com, who are experienced in manufactured housing issues, but the firm only renders legal advice to clients who have engaged the firm pursuant to a professional representation agreement in writing. Wells & Cuellar, P.C. does not guarantee in advance that it will accept your case. For lawyers in other states, try www.findlaw.com.