

How to Deal with "Agents"

By Ronald H. Usem Esq.

I am frequently asked to prepare "agents" agreements for clients who wish to use this method to increase sales. I tell them "no", but I will gladly draft an independent sales representatives (ISR) agreement. What's the difference? Everybody uses "agents". Here's your short answer:

Under common law, a principal is liable for the acts of its agent. The word "agent" has multiple ramifications in the law and should be used very sparingly and then only if carefully defined. One of the problems arises from the concept of "apparent agency". In its simplest form, if you have authorized someone to represent your company as an "agent" they may be able to bind you to contracts to which

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you do not wish to be bound, and subject you to liability for their actions even though you have not given them that authority. But since you have "authorized" them to act for you, hold themselves out to the public as your "agent," someone (not an insider) would have no way of knowing their actual authority. So if you clothe them with apparent authority to act on your behalf you could well be "stuck" with them or by them! Assuming you are the principal, you may not want to be liable for the acts of your "agent" except in very well defined and narrow circumstances.

Usually the smart principal will want to reduce risks rather than increase them if possible. If a person is your "agent" there is increased risk that they could be considered a "statutory employee" for tax and workers compensation purposes which that raises a whole host of other messy problems which you do not need. In order to reduce the risks, a carefully drafted "Independent Sales Representatives" (ISR) agreement should be used. Not only should it

spell out that the ISR is an independent contractor, it should clearly define his duties, obligations, (such as using only pre approved carriers, and quote rates to firms with pre approved credit,) and the obligations of the principal, such as payment/commissions, how they are calculated and when they are payable and what if any set off rights there are.

The agreement should specify that the ISR is responsible for the results of his work and the principal does not control the details of how the work is performed. Other subjects which the agreement could address are as follows:

1. Acknowledgment that the ISR is an independent contractor and *not* an employee;
2. All services will be performed under the principal's operating authority;
3. A specific list of ISR duties; (but not how they are to be performed);
4. A list of all expenses of operation for which the ISR is responsible including but not limited to advertising and promotions;
5. A list of all insurance ISR must have and an obligation that he maintains and provide proof whenever requested;
6. Acknowledgment that ISR is solely responsible for all income taxes and indemnity of principal for any such taxes;
7. A statement of how the ISR is to represent your business to the public, including how your name may or may not be used;
8. How credit limits of your customers are established;
9. How pricing for your services is established;
10. How carriers are "qualified";
11. Dispatching responsibilities if any;
12. Required documentation and reporting procedures;
13. The procedure for handling freight claims;
14. Rights in "house" accounts, new accounts and any accounts the ISR brought with him;
15. Invoicing and collection procedures;
16. Indemnification requirements;
17. Compliance with state and federal regulations;

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18. Time management and risk of loss to be solely the ISR's;
19. Confidentiality issues;
20. Back Solicitation issues;
21. How is compensation to be calculated including any set off rights of principal, and when it is payable;
22. How collection issues will be handled;
23. The term of the agreement and under what conditions it may be terminated and the rights and responsibilities of the parties on termination;
24. Arbitration or litigation terms; rights to "cure" alleged problems;

These are *some* of the subject matters that could/should be addressed but the list is not necessarily complete. The agreement should be designed to meet the particular operations and needs of the principal's business. The more compre-

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Transportation Intermediaries Association Ethics Committee

TIA Ethics Proceeding 08-10

Decision September 2, 2008

On June 26, 2008, a TIA member COMPANY A filed an ethics complaint against another TIA member, COMPANY B. Based on the information before it, the Committee has determined to issue a decision.

Role of the Committee

The TIA Code of Ethics is designed to promote the highest standard of ethics within the brokerage and third party logistics industry. Since 1978, TIA has made adherence to the TIA Code of Ethics a mandatory requirement for membership.

The role of the TIA Ethics Committee is to review complaints against TIA members to determine if the member lived up to its promise to abide by the spirit of the TIA Code of Ethics. The TIA Ethics Committee is neither a court of law nor an arbitration system. It is a peer review committee.

Discussion

This proceeding originated in November 2007 when a carrier fell off COMPANY A's loads. The loads were subsequently re-booked with COMPANY B, which held itself out as a contract carrier to COMPANY A. COMPANY A discovered that COMPANY B did not have motor carrier authority as either a motor carrier or a contract carrier; instead, COMPANY B maintains broker authority.

A meeting between the parties was held to discuss the issues surrounding the transactions. At the meeting, COMPANY A requested proof of payment to the carriers that actually transported the freight. Payments were verified and COMPANY A made all payments to COMPANY B.

While the proceeding should have ended at this point, COMPANY B filed a TIA Watchdog® report against COMPANY A, with the following statement.