

Memorandum
Sample Contract for Independent Contractor Relations
with Providers Providing Home Support Services in the Provider’s Home¹

The attached Sample Contract is intended for use by agency providers as a template in developing agency contracts with individual providers, who are providing home support services to consumers in the provider’s own home, under a Home and Community Waiver Program or similar program (the “Services Program”). The terms used to describe these living arrangements vary from state to state, sometimes being referred to as “shared living,” “host home,” “lifesharing,” and “adult foster care.” To avoid confusion in the Sample Contract, the individual provider is simply referred to as “Contractor.”

The Sample Contract is designed to conform only with guidance provided by the U.S. Department of Labor and is not designed to conform with the laws and regulations of individual States. Neither the Sample Contract nor this memorandum can be relied on as legal advice or tax advice.

DOL Guidance. The purpose of the Sample Contract is to provide sample contract terms that will help agencies conform with recent guidance provided by the United States Department of Labor (“DOL”).² This DOL guidance describes conditions under which an individual provider will be considered an independent contractor instead of an employee of the agency, an employee of the consumer, or an employee of the government agency administering

¹ The sample contract and accompanying memorandum were developed with the assistance of attorneys at Petruccelli, Martin & Haddow, LLP for the American Network of Community Options and Resources (ANCOR) with assistance and funding from the National Association of State Directors of Developmental Disabilities Services (NASDDDS) and the National Association of States United for Aging and Disabilities (NASUAD).

² DOL Administrator’s Interpretation No. 2014-1 (March 27, 2014) and DOL Fact Sheet No. 79G: Application of the Fair Labor Standards Act to Shared Living Programs, Including Adult Foster Care and Paid Roommate Situations.

the Services Program. The Sample Contract is designed to establish an independent contractor relationship with the individual provider when the consumer is living in the provider's home. If the consumer is not living in the provider's home, the Sample Contract should not be used.

Independent contractor circumstances. The Sample Contract describes the economic and other circumstances of the individual provider that will most ideally conform with the DOL guidance. Those circumstances can be summarized as follows:

The Provider has established a business as a self-employed, approved provider of Home Support Services to be provided in the Provider's own home.

The Provider is free to contract with another agency to provide services to any eligible person with developmental disabilities and is not obligated to perform work exclusively for or with the Agency.

The Provider is free to engage in any other business activities, provided that those other business activities do not interfere with the services and obligations required by the Contract.

The Provider has the opportunity for profit and loss as a result of the services being performed under the Contract.

The Provider has the right to provide the services and operate his/her business according to the Provider's best judgment subject to all applicable laws, policies and regulations, the Consumer's Service Plan, and the Agency's quality oversight.

The Provider is free to determine the schedule and manner of the day-to-day activities, the day-to-day management of the home, and the performance of the Home Support Services, subject to all applicable laws, policies and regulations, the Consumer's Service Plan, and the Agency's quality oversight.

Except for costs and expenses reimbursed by the HCBS Program, the Provider is responsible for all other costs and expenses of operating the business, including, but not limited to, vehicle and labor costs, including hiring and supervising employees or subcontractors, insurance, and all other business-related expenses required to operate as an independent contractor.

The Agency provides quality oversight and monitoring. It does not determine the provider's schedule or direct the manner in which the service is provided, except to ensure quality and compliance with applicable laws and regulations.

Before using the Sample Contract, an agency should carefully review the provider's circumstances and its relationship with the provider. If an Agency wishes to contract with an individual provider, whose circumstances do not completely conform to the above list and Section 5 of the Contract, it should consult with legal counsel to determine whether an independent contractor relationship may still be established in conformance with DOL guidance. If, based on advice of legal counsel, an Agency decides to contract with such individual, the Agency and legal counsel should make sure the Contract accurately describes the individual provider's circumstances. The statements in a contract describing the circumstances of the parties and asserting the existence of an independent contractor are not mere recitals; they must accurately reflect the economic and operational realities of the provider's circumstances and his/her relationship with the agency.

There are some "red flag" circumstances that should be avoided. It is recommended that Agencies not contract with providers who are also performing separate work for the Agency as an employee. The Agency should not own or lease the home or apartment in which the services are provided, and should not co-own, co-lease, or guarantee the home or apartment. If the Agency provides training for individual providers, it should not mandate that a provider with whom it contracts receive training from the Agency. If the Agency does train providers, who are independent contractors, the training should be designed to reinforce the

provider's understanding of the relative roles of the Agency and provider in their contractual relationship, and of the provider's independent contractor status.

Contract format. The Sample Contract is organized as follows:

Sections 1-4 are introductory sections identifying the parties, the purpose of the contract, etc.

Section 5 contains all of the terms and conditions pertaining to the provider's independent contractor status.

Section 6 contains all of the provider's performance obligations.

Section 7 contains all of the agency's performance obligations.

Section 8 pertains to the contract term and termination provisions.

Sections 9 through 16 contain typical miscellaneous provisions generally applicable to contracts.

The provisions describing the economic and other circumstances of the individual provider that most ideally conform with the DOL guidance, are consolidated in Section 5. The other sections of the Sample Contract (1-4 and 6-10) are provided for context and to offer terms that reflect best practices among private provider agencies. Because Service Programs vary widely from state to state, Sections 1-4 and 6-10 in particular must be carefully reviewed and revised as necessary to conform with the local regulations, policies and practices. There are a few terms in these sections that are intended to reinforce the terms in Section 5 (e.g., Section 1.A, "not an employer;" Section 1.B, "self-employed independent contractor;" etc.). It is recommended that these terms and the terms in Section 5 not be revised without advice from legal counsel.

Supplemental terms required. The Sample Contract is a template only; it does not contain all terms and conditions required to form a complete contract. Extensive supplementation is required. Certain terms are left blank to be filled in with the names of the parties, the name of the Services Program being administered, the name of the state agency administering the program, the appropriate program nomenclature for the consumer service plan, etc. Also, because of the state-to-state variations in service programs, many sections of the contract contain only general references to the subject matter that needs to be addressed with details to be provided by the Agency based on the local regulations and/or policies. These references appear in italics within brackets.

When an agency supplements the Sample Contract, it must keep in mind its independent contractor relationship with the provider. The agency must be careful not to incorporate terms and conditions that are inconsistent with the provider's status as an independent contractor. For instance, in preparing contract terms describing the Home Support Services to be provided or describing the quality oversight/monitoring role of the agency, care must be taken to avoid directing or controlling matters that are within the provider's discretion as an independent contractor. While ensuring compliance with prescriptive regulations is appropriate to the agency's quality oversight/monitoring role, prescribing the provider's manner of complying with the regulations may not be. The same care must be taken in the implementation of the contract. The terms and conditions of the contract must accurately reflect the realities, not only at the time the contract is signed, but also throughout its implementation.

State labor laws. The Sample Contract has been drafted to conform to the federal DOL guidance. Each state has its own laws and regulations pertaining to independent contractor status, particularly with respect to state worker's compensation and unemployment compensation programs. The Sample Contract cannot be relied upon for compliance with such state laws and regulations. Agencies should consult with legal advisors, who are licensed in their state of operation, to determine whether additional terms or conditions must be included to comply with such state laws and regulations. The consequences for not complying with such laws and regulations can be severe.

Not legal or tax advice. The Sample Contract is offered for general guidance and neither the Sample Contract nor this memorandum is intended as legal advice or tax advice. Each agency should have the Sample Contract reviewed by independent legal counsel and tax advisors before using the Sample Contract as a template for the agency's contracts with individual providers. In particular, agencies should have the terms and conditions pertaining to independent contractor status reviewed by competent attorneys licensed in their local jurisdictions.