



AGENCY AGREEMENT & GUIDE

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1. Overview

Hiring an agent or agency to represent your company is an easy and cost-effective way to grow your business without hiring additional employees. In addition to the obvious expenses of salaries, bonuses, and other compensation, employees can cost a company in more subtle ways, requiring further investment in benefits, payroll taxes, insurance premiums, office space, and equipment. Such additional costs aren't required for agents; companies can use such resources for specific tasks according to business needs, and can avoid the legal minefields of hiring and firing staff according to the ebb and flow of the market. Organizations can select experts to perform work when needed, and can avoid the cost and hassle of providing additional education or training to current employees.

There are risks, of course, for businesses using agents or agencies, the most dangerous of which is that individual representatives will be reclassified as employees. If this happens, the company using the agents will be required to reimburse the IRS or state tax authority for delinquent employment taxes, interest, and penalties. Although a business cannot insulate itself absolutely from reclassifications or contract audits, a written agency agreement can offer a certain amount of protection from such charges.

The enclosed document can provide a good starting point for your agency arrangement. You and the agent or agency must continue to discuss the terms of your agreement, settling questions about work parameters, payment, and responsibilities. Once you have agreed on contract terms and have signed the attached form, each party can focus on its area of expertise—the company on the development of its business and the agent on proper representation of the company.

2. Dos & Don'ts Checklist

- An agency agreement is a contract that creates a “fiduciary” relationship between two parties. Party A (sometimes called the “principal”) agrees that the actions of Party B (sometimes called the “agent”) can bind Party A to an agreement with a third party. In other words, the principal authorizes the agent to act on its behalf.
- The enclosed agreement is designed to protect the parties' rights during the contract term. It does not, however, describe what tasks will be performed or the rates applicable to any such work. These issues should be resolved by the parties, drafted, and attached to the enclosed document as Exhibit A.
- Before sitting down to draft Exhibit A, decide what your goals are. It can contain any agreed-on terms but should, at a minimum, include a description of the agent's tasks, the amount to be paid, the terms of payment, deadlines for completion, and the specific end products expected (if any). Clarify the terms and conditions of your agreement before memorializing them in writing.
- Allow each party to spend time reviewing the agreement and (once drafted) Exhibit A. This will reduce the likelihood, or at least the efficacy, of a claim that a party did not understand any terms or how those might affect the agreement as a whole.
- Both parties should review the completed agreement carefully to ensure that **all relevant deal points** have been included. It is better to be over-inclusive than under-inclusive. Do not assume that certain expectations or terms are agreed to if they are not stated expressly on the document.

- A written agreement is only the first step in establishing an individual's or company's agency (i.e., not employee) status. Once signed, both parties must follow its terms exactly to make sure that status is maintained.
- Sign two copies of the agreement, one for you and one for the other party.
- Keep your copy of the signed agreement for your records. At the end of its term, you and the other party can revisit its provisions and consider whether to renew.
- Depending on the nature of its terms, you may decide to have your agreement witnessed or notarized. This will limit later challenges to the validity of a party's signature.
- If your agreement is complicated, do not use the enclosed form. Contact an attorney to help you draft a document that will meet your specific needs.

3. Agency Agreement Instructions

The following provision-by-provision instructions will help you understand the terms of your agreement. You can use the sample included in this packet as a starting point when revising or drafting your own agency contract.

The numbers below (e.g. Section 1, Section 2, etc.) refer to the corresponding provisions in the agreement. Please review the entire document before beginning your step-by-step process.

- **Introduction of Parties.** Identifies the document as an agency agreement. Write in the date on which the agreement will become effective (often the date on which it is signed). Identify the parties and, if applicable, what type of organization(s) they are. Note that each party is given a name (e.g., "Principal") that will be used throughout the agreement. The company is called the "Principal" and the agent is called the "Agent."
- **Recitals.** The "whereas" clauses, referred to as recitals, define the world of the agreement and offer key background information about the parties. Provide a brief description of the Principal's business and the general reason the Agent is being retained. Don't worry about writing all of the details in this space; you'll have the chance to provide additional information later in the document.

Note that the word "exclusive" is bracketed in the second line of the recitals. In an exclusive agency relationship, the parties agree that no other agents may be appointed. If this does not describe your arrangement, (i.e., the company will be able to appoint and use other agents) delete the word "exclusive."

- **Section 1: Purpose; Appointment.** Serves as the actual appointment of the Agent as the Principal's representative. Again, if this is not an exclusive agency arrangement, delete the bracketed word "exclusive."
- **Section 2: Term.** Indicate how long the initial agreement term will last. There are two options provided. In the first, the term will continue until all of the work under the agreement has been performed. This may be a good selection if there is a clear end to the responsibilities that the agent will perform (e.g., sell 100 widgets). The second option provides for a first segment of one year, with

continuing one-year renewals. If you want to make these segments longer, you may do so. However, these one year increments provide enough time to test the relationship, without locking yourself in a long-term deal.

The bracketed sentence at the end of both choices is optional, and allows the parties to set a deadline by which all services must be finished or all extensions must end. Delete this provision if you do not want to set an absolute expiration date for your agreement.

- **Section 3: Responsibilities; Scope of Authority.** Allows the parties to limit the extent to which the Agent can bind the Principal. If there are areas in which you don't want the Agent to act, or if there are specific tasks that you don't want the Agent to perform, list those restrictions in the blank space provided.
- **Section 4: Territory.** Delimits the geographical area in which the Agent's efforts should be focused. There are two options offered and you should select the one that best characterizes your agreement. If there are no geographical restrictions on the Agent's activities, select the first. If there are such limitations, choose the second option and describe in detail what those limitations will be. If you do choose the second option, you also have the opportunity to give the Agent exclusivity within a specific geographic area. If you want the Agent to be the sole representative of the Company in the area described, delete the brackets and include that sentence. If you do not want the Agent to be the sole representative in that area, delete the phrase entirely.
- **Section 5: Compensation.** Describes the payment that the Agent will receive for performing the services described in the Agreement. There are two options provided, and you should select the one that best suits your arrangement. The first indicates that compensation will be paid in connection with the Agent's earnings. When the Agent's efforts bring in money, the Agent will receive a percentage of that money. Enter the percentage amount that the Agent will receive. The next blank allows you to describe briefly what the Agent is doing. For example, you could write "in connection with sales of widgets" or "in connection with widget marketing." The final bracketed segment of the first option allows the Agent to profit from its actions performed under the Agreement, for a certain amount of time after the termination of the Agreement. You can decide how long this period should be.

The second option is more straightforward. Under this alternative, the Agent will receive a flat fee for its services, unrelated to any sales or purchases that it makes. Enter the amount the Agent will be paid (as a total sum, a monthly rate, or otherwise) and explain how these payments will be made (e.g., weekly, monthly, according to milestones met, etc.).
- **Section 6: Taxes.** The two subsections of this Section 6 are essentially opposite sides of the same coin. Subsection 6(a) provides that the Agent will be solely responsible for any taxes that may arise as a result of its payment under the Agreement. Subsection 6(b) indicates that the Principal will not be responsible for deducting any taxes from the payments that are made to the Agent. Together, these subsections reiterate the status of the parties—because the Agent is not an employee of the Principal, it will be responsible for paying its own taxes.
- **Section 7: Expenses.** Allows for some reimbursement of any unusual expenses that the Agent incurs in performing its duties under the Agreement. Note that this does not include ordinary business expenses. If the Principal began to reimburse the Agent for such everyday costs, the relationship might be seen as that of an employer/employee.

There is an optional paragraph allowing the parties to designate specific additional expenses that will not be reimbursed. If you do not wish to specify such non-reimbursable costs, delete this subsection of the Agreement.

- **(Optional) Section 8: Records.** An optional section allowing the Principal the opportunity to review the Agent's records about its performance under the Agreement. Essentially, this paragraph gives the Principal audit rights—the right to question any invoice or claim made by the Agent about its work. If you remove this section, correct the section numbers and internal references in the agreement.
- **Section 9: Insurance.** Requires the Agent to maintain insurance. You can determine what types of insurance will be required, which will be based on your industry, the Agent, and your specific needs. The bracketed types in the paragraph are examples only, and are not meant to be complete or necessary for every business.
- **Section 10: Termination.** Explains that certain actions or events, including written notice or material breach, will cause the agreement to end out of time (i.e., before the services are completed or the end of the term, if any). Write in the amount of notice a party must give of its intent to terminate or to notify the other of a breach. There is an optional paragraph that allows you to identify the Agent's failure to maintain its licenses as a material breach of the agreement. This may or may not be relevant to your situation or business, and you can delete or modify this section based on your company's needs.
- **Section 11: Amendments.** Indicates that all changes to the agreement must be in writing and signed by the parties.
- **Section 12: Parties' Representations and Warranties.** The assumptions that underlie the Agreement. In other words, each party is entering into the agreement based on the other party's statement that the items in this paragraph are true. The listed representations are that each can enter into the agreement and will follow all applicable laws. If there are additional representations and warranties that you want to add, you can do so in the blank space provided.
- **Section 13: Indemnification.** This provision allocates responsibilities between the parties if problems arise in the future and protects each party from the financial consequences of the other's illegal or harmful conduct.
- **Section 14: Use of Trademarks.** States the Agent will not use the Principal's trademarks inappropriately or acquire a trademark of its own that is similar to the Principal's. For example, an agent for XYZ cannot apply for a trademark on XYZ. This section also provides that the Agent may not continue to use the Principal's trademarks after the agreement terminates.
- **Section 15: Relationship of Parties.** Explains that the Agent is an independent contractor only, and is not an employee or partner of the Principal. As noted above, this is an important distinction for legal reasons, including requirements of insurance coverage, liability, and taxes. The agreement seeks to emphasize this divide, but both parties should take care not to blur the line between independent contractor and employee in the performance of their duties. Review your state's laws governing agents to make sure that the enclosed agreement follows local restrictions.
- **Section 16: Assignment.** Explains that each party must obtain the other's written permission before assigning its obligations and interests.

- **Section 17: Successors and Assigns.** States that the parties' rights and obligations will be passed on to heirs or, in the case of companies, successor organizations or organizations to which rights and obligations have been permissibly assigned.
- **Section 18: No Implied Waiver.** Explains that if either party allows the other to ignore or break an obligation under the agreement, it does not mean that party waives any future rights to require the other to fulfill those (or any other) obligations.
- **Section 19: Notice.** Lists the addresses to which all official or legal correspondence should be delivered. Write in a mailing address for both the Principal and the Agent.
- **Section 20: Governing Law.** Allows the parties to choose the state laws that will be used to interpret the document. Note that this is not a venue provision. The included language will not impact where a potential claim can be brought. Write the applicable state law in the blank provided.
- **Section 21: Counterparts / Electronic Signatures.** The title of this provision sounds complicated, but it is simple to explain: it says that even if the parties sign the agreement in different locations, or use electronic devices to transmit signatures (e.g., fax machines or computers), all of the separate pieces will be considered part of the same agreement. In a modern world where signing parties are often not in the same city - much less the same room - this provision ensures that business can be transacted efficiently, without sacrificing the validity of the agreement as a whole.
- **Section 22: Severability.** Protects the terms of the agreement as a whole, even if one part is later invalidated. For example, if a state law is passed prohibiting choice-of-law clauses, it will not undo the entire agreement. Instead, only the section dealing with choice of law would be invalidated, leaving the remainder of the contract enforceable.
- **Section 23: Entire Agreement.** The parties' agreement that the document they're signing is "the agreement" about the issues involved. Unfortunately, the inclusion of this provision will not prevent a party from arguing that other enforceable promises exist, but it will provide you some protection from these claims.
- **Section 24: Headings.** Notes that the headings at the beginning of each section are meant to organize the document, and should not be considered operational parts of the agreement.

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Form Sample

AGENCY AGREEMENT

This Agency Agreement (the "Agreement") is made on _____, 20__ (the "Effective Date") by and between _____, a _____ [corporation] [limited liability company] [etc.] (the "Principal"), and _____, a _____ [corporation] [limited liability company] [etc.] (the "Agent") (each a "Party" and collectively the "Parties").

RECITALS

WHEREAS, the Principal is engaged in the business of

_____; and

WHEREAS, the Principal wishes to appoint the Agent as its [exclusive] agent to _____; and

WHEREAS, the Agent agrees to accept such appointment on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual agreements and representations contained in this Agreement, the Parties agree as follows:

1. PURPOSE