

**Memorandum**  
**Sample Contract for Independent Contractor Relations with Contractors Providing Home Support Services in the Contractor's Home<sup>1</sup>**

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The attached Sample Contract is intended for use by agencies as a template in developing Agency contracts with individual Contractors, who are providing home support services to consumers in the Contractor'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 Contractor is simply referred to as "Contractor."

**The Sample Contract is designed to conform with the changes made to 29 C.F.R. 795 “Employee or Independent Contractor Classification under the Fair Labor Standards Act” effective March 11, 2024, and with guidance provided by the U.S. Department of Labor. The Sample Contract 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.**

**29 C.F.R. 795 “Employee or Independent Contractor Classification under the Fair Labor Standards Act” effective March 11, 2024.** The Sample Contract was created to provide sample contract terms that will help agencies establish an independent Contractor relationship with the individual Contractor when the consumer is living in the Contractor's home. If the consumer is not living in the Contractor's home, the Sample Contract should not be used.

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<sup>1</sup> 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 ADvancing States.

Further, the sample contract is designed to establish an independent Contractor relationship under the analysis of 29 C.F.R. 795 as effective March 11, 2024. Changes to the rule effective March 11, 2024 have in part, 1) updated the totality of the circumstances economic reality test for determining an employee or independent Contractor relationship under the Fair Labor Standards Act, 2) provided guidance and additional context when weighing the factors within the economic reality test, and 3) aligned the rule and its guidance with the current analysis applied by the courts.

Although the sample contract considers these changes, it does not contemplate every specific type of Agency – Contractor relationship. Agencies and potential Contractors should consult local legal counsel when considering the factors within 29 C.F.R. 795.

**DOL Guidance.** The Sample Contract was originally created to provide sample contract terms that will help agencies conform with guidance provided by the United States Department of Labor ("DOL").<sup>2</sup> This DOL guidance describes conditions under which an individual Contractor 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 the Services Program.

The guidance provided by the DOL was issued before the rule change effective March 11, 2024, and although appearing to be consistent with the rule change, was not updated or addressed in any way within the rule change. An Agency and a potential Contractor should consult respective legal counsel when determining whether a relationship conforms with the DOL guidance, and whether such guidance is applicable to a potential Contractors individual circumstances.

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<sup>2</sup> 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.

**Independent Contractor circumstances.** The Sample Contract describes the economic and other circumstances of the individual Contractor that will most ideally conform with 29 C.F.R. 795 and the DOL guidance. Those circumstances can be summarized as follows:

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

The Contractor is free to contract with another Agency to provide services to any eligible person with developmental disabilities and is not obligated to work exclusively with or through the Agency.

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

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

The Contractor 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 Contractor 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 Contractor'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

Contractor's circumstances and its relationship with the Contractor. If an Agency wishes to contract with an individual Contractor, 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 29 C.F.R 795 and 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 Contractor'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 Contractor'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 Contractors 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 Contractors, it should not mandate that a Contractor with whom it contracts receive training from the Agency. If the Agency does train Contractors, who are independent contractors, the training should be designed to reinforce the Contractor's understanding of the relative roles of the Agency and Contractor in their contractual relationship, and of the Contractor'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 Contractor's independent contractor status.

Section 6 contains all of the Contractor'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 Contractor that most ideally conform with 29 C.F.R. 795 and 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 Contractor 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, "Agency;" Section 1.C, "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 Contractor. The Agency must be careful not to incorporate terms and conditions that are inconsistent with the Contractor'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 Contractor's discretion as an independent contractor. While ensuring compliance with prescriptive regulations is appropriate to the Agency's quality oversight/monitoring role, prescribing the Contractor'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 Contractors. In particular, agencies should have the terms and conditions pertaining to independent contractor status reviewed by competent attorneys licensed in their local jurisdictions.