

MANAGEMENT SERVICES AGREEMENT & GUIDE

Included:

Overview

Dos and Don'ts Checklist

Management Services Agreement Instructions

Sample Management Services Agreement

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1. Overview

From an accounting perspective, hiring outside managers is cheaper than employing an individual full time. In addition to the obvious expenses of salaries, bonuses, and other compensation, employees can cost a company in more subtle ways, requiring further investments in benefits, payroll taxes, insurance premiums, office space, and equipment. Such additional costs aren't required for external managers. Companies can use these individuals 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 choose experts to perform necessary work when needed, and can avoid the cost and hassle of providing additional education or training to current employees.

There are risks, of course, to businesses using outside managers, the most dangerous of which is that those individuals will be reclassified as employees. If this happens, the company using the managers 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, written agreements can offer a certain amount of protection from such charges.

The enclosed document can provide a good starting point for your management services arrangement. You and your manager 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 manager on the day-to-day management of the company.

2. Dos & Don'ts Checklist

The enclosed agreement is designed to protect the parties' rights during the contract term. It does not, however, describe what specific tasks will be performed. 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 manager's tasks, goals, milestones, and any specific end-products expected. 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 of how those might affect the agreement as a whole.
The enclosed document is drafted in a way that elevates the company's interests over those of the manager. If you believe this agreement is too imbalanced for your purposes, or too restrictive to allow the manager to perform his or her duties, revise or restructure the provisions to fit your organizational goals.



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 in the document.
A written agreement is only the first step in establishing an individual's independent contractor status. Once signed, both parties must follow its terms <u>exactly</u> to make sure that status is maintained.
Review your state's laws governing independent contractors. In recent years, many states have made it difficult for individuals to qualify, imposing absolute requirements about the freedom an outside manager must have from company control. Certain provisions in the enclosed agreement may need to be strengthened or adapted to fit your state's rules.
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. Management Services Agreement Instructions

The following provision-by-provision instructions will help you understand the terms of your agreement.

The numbers below (e.g., Section 1, Section 2, etc.) correspond to provisions in the form. Please review the entire document before starting your step-by-step process.

- Introduction. Identifies the document as a management services 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., "Company") that will be used throughout the agreement. As you probably guessed, the hiring party is called the "Company" and the manager is called the "Manager." When the Agreement refers to one or the other of the individuals (i.e., no one specifically), the term "Parties" is used.
- **Recitals.** The "whereas" clauses, referred to as recitals, define the world of the agreement and offer key background information about the parties. In this agreement, the recitals include a simple statement of your intent to enter into a management services arrangement. Provide a <u>brief</u> description of the Company's business in the blank provided.
- **Section 1: Appointment/Acceptance.** This section confirms the Parties' agreement that the Manager will serve as the Manager of the Company's organization. The details will be provided more specifically later in the Agreement and in Exhibit A.



- Section 2: Responsibilities. Lists each Party's responsibilities under the Agreement. Essentially, the Manager is agreeing to perform the agreed-on services with adequate attention and care, and the Company is agreeing to assist in this performance by providing necessary information and guidance. There are also spaces for you and the other party to insert additional obligations (e.g., on the Manager's request, the Company will provide regular feedback about the Services being provided) and information about minimum hours of service that the Manager will provide to the Company. Delete these subsections if you do not have additional responsibilities you want to allocate and you do not want to establish a minimum time requirement.
- **Section 3: Nature of Relationship.** Explains that the Manager is not an employee or partner of the Company. 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 independent contractors to make sure that the enclosed agreement follows local restrictions.
- **Section 4: Term.** (a) Allows you to specify how long you want the first term of the Agreement to last. By calling it the "Initial Term" you are not obligating yourself to any additional terms it may be the only one. Enter the number of years you want the Initial Term to last.
 - (b) This Agreement will automatically renew itself unless the Parties take action, but not for the equivalent of the Initial Term. Instead, the Agreement will renew on a monthly basis until one of the Parties gives notice of its desire to end it. Enter the number of days advance notice that the Parties must give to end the Agreement.
- **Section 5: Insurance Coverage.** Requires both Parties to obtain or maintain all applicable insurance coverage. Enter the minimum dollar amount that this coverage should be. This will vary depending on the size of your business and the extent of the services offered. Note too that if possible, each Party is instructed to list the other as an "additional named insured" on the policies they maintain.
- Section 6: Confidential Information. Defines confidential information for purposes of the agreement and explains how the Manager will treat that information. Note two important details: (1) the Manager can use the information only for purposes intended by the Agreement (e.g., if the information was disclosed to help the Manager complete its Services, the information can be used only for that purpose); and (2) the Manager can discuss the information only with certain individuals in the Company itself.
- **Section 7: Representations and Warranties.** Details the parties' promises under the Agreement. Each party is agreeing to enter into the arrangement based on the conditions listed in this section (e.g., that each is capable of entering the agreement and satisfying its terms).
- Section 8: Compensation.
 - (a) Explains that the Manager will be paid a fee in exchange for its performance of the Services under this Agreement. The fee is initially stated as the full yearly amount, but this fee can be paid in installments pursuant to the Parties' agreement. Enter the frequency with which you want payments to be forwarded to the Manager (e.g., weekly, bi-weekly, etc.).
 - (b) The circumstances under which no payments will be made.



- (c) Emphasizes that the payments outlined are the Manager's only compensation for its services under the Agreement.
- (d) Notes that the Manager will pay for its own internal expenses. This is another reflection of the fact that the Company and the Manager are functioning as separate entities (i.e., not as employer and employee). However, expenses that the Manager incurs specifically in performing services for the Company will be reimbursed if sufficient evidence of those expenses is provided to the Company.
- (e) Indicates that the Manager is responsible for paying its own taxes on the money it receives (i.e., it is not receiving a "salary" as an employee of the Company and the Company will not withhold those amounts on its behalf).
- **(Optional) Section 9: Reporting.** An optional provision requiring the Manager to provide periodic reports on the services it is providing. You can designate a contact person at the Company to receive these reports, indicate how frequently they should be provided, and specify the type of information to be supplied. If you remove this section, correct the section numbers and internal references in the agreement.
- **Section 10: Work for Hire.** Grants ownership of all work performed by the Manager under the Agreement to the Company, including completed products and material produced during creation. Moreover, if any work is in fact owned by the Manager, the Manager promises to assign its interest in any such work to the Company.
- Section 11: No Conflict of Interest; Other Activities. The Manager's promise that it is not currently working with any other company or product that competes with the Company. Note, however, that this section expressly permits the Manager to contract with other companies to the extent its responsibilities under those contracts don't damage the Company or its interests.
- **Section 12: 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.
- **Section 13: Return of Property.** This is an extremely important provision, and although it may seem obvious to you that property should be returned after the end of the agreement, this paragraph makes that plain. Enter the time period within which the Manager must return this property after the Agreement is terminated. There is an optional bracketed phrase at the end of the paragraph that references Exhibit B, and explains that any items listed in that exhibit are taken to be the Manager's property. If you do not want to include this, delete the bracketed sentence and Exhibit B.
- Section 14: Indemnification. This provision allocates responsibilities between the Parties if
 problems arise in the future and protects each Party from the consequences of the other's negligent
 or intentional conduct.
- **Section 15: Use of Trademarks.** States the Manager will not use the Company's trademarks inappropriately or acquire a trademark of its own that is similar to the Company's. For example, an independent contractor for XYZ can not apply for a trademark on Sam's XYZ Products. This section also provides that the Manager may not continue to use the Company's trademarks after the agreement terminates.



- **Section 16:** No Publicity. States that the Manager doesn't have the right to make significant public statements on the Company's behalf without its specific permission.
- **Section 17: Modification.** Indicates that any changes to the document are ineffective unless they are made in writing and signed by both Parties.
- **Section 18: Assignment.** Explains that each Party must obtain the other's written permission before assigning its obligations and interests.
- **Section 19: 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 20: Force Majeure.** Releases a Party from its obligations if its performance is made impossible by an event beyond its control (e.g., flood, earthquake, etc.). This release is effective only as long as circumstances continue to prevent that party's completion of its tasks.
- **Section 21: 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 22: Notice.** Lists the addresses to which all official or legal correspondence should be delivered. Write in a mailing address for both the Company and the Manager.
- **Section 23: 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 in the applicable state law in the blanks provided.
- Section 24: 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 25: 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 document. Instead, only the section dealing with choice of law would be invalidated, leaving the remainder of the agreement enforceable.
- **Section 26: 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 27: 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 note.



- Exhibit A: Services and Specifications. The form of Exhibit A provided is meant as an example only. You and the other Party should restructure and revise this exhibit to fit your situation and individual needs. The list of required services is generally applicable to managers, but you may want to include information that is specific to the industry in which those services will be provided. The services listed are not exhaustive: think carefully about what will matter to you during the performance of the work.
- (Optional) Exhibit B: List of Manager's Property. An optional exhibit that allows the Manager to designate certain property as its own. This property will not need to be returned to the Company at the termination of the Agreement. Delete this exhibit if the Manager does not want to list any property, or if it doesn't suit your arrangement.

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Form Sample

MANAGEMENT SERVICES AGREEMENT

This Management Services Agreement (the "Agreement") is entered into as of
, 20 (the "Effective Date") by and between , a
[individual/corporation/partnership/etc.] (the "Manager"), and
, a[corporation/partnership/etc.] (the
"Company," and together with the Manager, the "Parties").
RECITALS
WHEREAS, the Company is engaged in the business of
and
WHEREAS, the Manager is experienced and skilled in the performance of
general management, business advisory, administrative, fiscal, and accounting services in
the Company's industry; and
WHEREAS , the Company wishes to engage the Manager as an external management consultant for the Company for the purpose of providing such professional managerial services as those services are more particularly set forth in Exhibit A attached hereto and made a part hereof (the "Services") on the terms and conditions set follow; and
WHEREAS, the Manager wishes to provide the Service terms of this Agreement; and

