

# *2023 Legal Topics for Tour Operators*



**MENT**  
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*What We Will  
Discuss Today:*

The Legal Elements of Success

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Contracting with Schools in 2023

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Independent Contractors

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Seller of Travel Regulations and  
Compliance

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Non-Compete Agreements

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Trademarks

A photograph of a city skyline at sunset, with the Transamerica Pyramid prominently visible. In the foreground, several tall, purple, spiky flowers are in focus. An orange diagonal shape is overlaid on the bottom left corner, containing white text.

***Contracting with  
Schools in 2023***

# Group Contracts: Shifting Responsibility Between Sponsors and Participants

## Sponsor Agreements should include:

- Price – potential changes
- Payments dates and schedule
- Trip details – dates of travel, destinations, accommodations
- Damages and limitations on damages
- Choice of law and venue selection
- Dispute resolution
- Cancellations and refund schedule  
acknowledgement of participants agreement to their terms

## Participant Agreements should include:

- Assumption of risk
- Release of liability
- Expected conduct
- Photographic likeness
- Covid-19 waiver

# Contracting Transparency with Clients

- Any third-party Supplier policies should be known to guests and they should be advised they are subject to supplier terms
- Cancellation policies should be transparent
- Be prepared to share the cancellation terms of suppliers



# Is a Waiver Signed by a Parent Enforceable?

- Caselaw is divided and on a state-by-state basis.
- Many states rule parental waivers unenforceable.

**Kelly v. United States, 809 F. Supp. 2d 429, 436 (E.D.N.C. 2011)**

- Majority rule that parents may not bind their children to pre-injury liability waivers, though many states recognize an exception where the liability waiver is in the context of non-profit activities sponsored by schools, volunteers, or community organizations).

## How to Protect Yourself?

- Liability waivers may still include a provision which expressly waives both the claims of the child and their guardians.

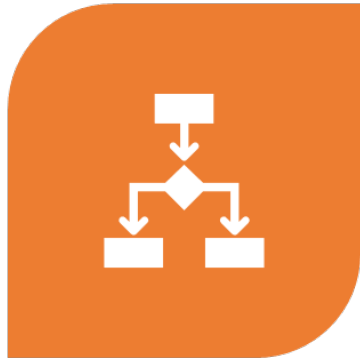
**Blackwell ex rel. Blackwell v. Sky High Sports Nashville Operations, LLC, 523 S.W.3d 624, 634 (Tenn. Ct. App. 2017)**

- Trial court only found that the liability waiver was unenforceable against the minor, not the guardian.
- Typically, parents incur the cost of their child's medical expenses, therefore limiting the parent's recovery may be particularly effective.



*Independent  
Contractors*  
Where are we now?

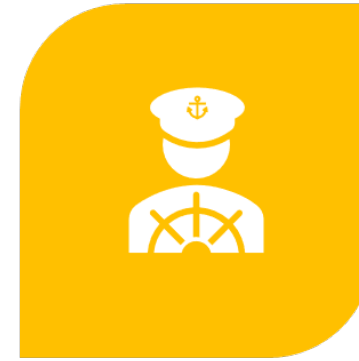
# Employee vs. Independent Contractor



CONTROL THE MANNER AND MEANS OF ACCOMPLISHING A DESIRED RESULT;



IS THE PERSON ENGAGED IN A SEPARATELY ESTABLISHED OCCUPATION OR BUSINESS;



THE KIND OF OCCUPATION, WITH REFERENCE TO WHETHER, IN THE LOCALITY, THE WORK IS USUALLY DONE UNDER THE DIRECTION OF A PRINCIPAL WITHOUT SUPERVISION;

The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not *what* will be done and *how* it will be done.



# Employee vs. Independent Contractor

On October 2022, the U.S. Department of Labor announced a proposed rule entitled *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*.

The proposed rule updates the test for determining whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor.

The rule broadens the definition of an employee and if issued would significantly increase the number of workers classified as employees under the FLSA.

## What is the Test Under the Proposed Rule?

- The new test is based on the “economic reality” of the work arrangement when viewing the totality of the circumstances.
- It is intended to encompass all individuals who “as a matter of economic reality” are “economically dependent” on the employer for work. An independent contractor is defined as a worker who is “in business for themselves.”
- To determine whether a worker is “economically dependent” on an employer for work, the proposed rule provides factors for employers to consider. Importantly,

# Employee vs. Independent Contractor

1. Control the manner and means of accomplishing a desired result;
2. Is the person engaged in a separately established occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision;
4. What skill is required;
5. Does the principal or the person providing the services supply the instrumentalities, tools, and place of work for the person doing the work;
6. Length of time of the assignment (i.e. isolated or continuous);
7. Method of payment (time, piece, job);
8. Is the work part of the regular business of the Principal;
9. What do the parties believe;
10. Extent of actual control by Principal over manner and means of performing services; and
11. Whether the Principal is or is not engaged in a business enterprise.

A photograph of purple flowers in the foreground with a city skyline in the background at sunset. The flowers are tall and spiky, with many small purple blossoms. The city skyline is visible in the background, with several tall buildings, including the Transamerica Pyramid. The sky is a warm orange and yellow color, suggesting sunset. The overall scene is a mix of nature and urban landscape.

# *Non-Compete Agreements*

# Independent Contractors: What About Non-Compete Agreements?

- Non-Compete clauses do not contemplate why the termination happens and most state that the clause will survive termination.
- Be careful when hiring to ensure that your new employee will not be in breach of their agreement.
- A non-compete is not enforceable in the State of California. The law prohibits an employer from restraining anyone is engaged in legal practice or trade.



# Non-Competes: Evolving Legislation

- President Biden has requested that the Federal Trade Commission set limits on the use of non-compete clauses:

"To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."



# Non-Competes: Evolving Legislation

- The FTC has now proposed a federal ban on all non-compete agreements.
- Currently, FTC is seeking public comment on the proposed rule. The new rule would affect over 30 million contracts and employees.
- Rule would apply to full time employees **and independent contractors.**
- Comment period is open until March 10, 2023.





*Seller of Travel  
Laws*

# Seller of Travel: What You Need to be Concerned About (and What You Don't)

- Are you registered?
- Should you be registered?
- Do you fall under an exemption?
  - ARC accreditation
  - Student Tour Operators likely not able to use exemptions
- What is required to register?
  - Register as an entity in the state
  - Obtain a bank account or bond
  - Register as a Seller of Travel
  - Disclosure Requirements





# Seller of Travel: Penalties for Non-Compliance by State

## **California:**

- 1) A misdemeanor by fine of not more than \$10,000, by imprisonment in a county jail for not more than one year, or by both fine and imprisonment for each violation.
- 2) Where money or real or personal property received or obtained by a seller of travel for transportation or travel services from any and all persons aggregates \$2,350 or more in any consecutive 12-month period, or the payment or payments by or on behalf of any one passenger exceeds in the aggregate e \$950 in any 12-month period and a violation has occurred under the Seller of Travel law, is punishable either as a misdemeanor or as a felony by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months, or two or three years, by a fine of not more than \$25,000, or by both that fine and imprisonment for each violation for each individual violation.
- 3) Any intentional use for any purpose of a false seller of travel registration number, with intent to defraud, by an unregistered seller of travel is punishable as a misdemeanor or felony.
- 4) The law allows the Attorney General to suspend the registration of a seller of travel who has been convicted of a felony under Section 17550.195.
- 5) Sellers of travel, in addition, must comply with Sections 17537, 17537.1, and 17537.2 of the Business and Professions Code and all other applicable California laws.

# Seller of Travel: Penalties for Non-Compliance

## San Diego Travel Agent Charged with Embezzling Funds for Canceled School Trips

A San Diego-based travel agent has been charged with embezzling hundreds of thousands of dollars paid by more than 150 parents for school trips that were canceled due to the COVID-19 pandemic.

Marie Colette Martin, 52, is accused of spending the funds on personal expenses rather than refunding her parents after the trips were canceled.

She has pleaded not guilty to 27 felony counts of grand theft and seller of travel violations. Prosecutors allege more than \$415,000 was embezzled in total.

# Seller of Travel: Penalties for Non-Compliance print arrest warrant

COUNT 1 -SELLER OF TRAVEL - FAILURE TO DEPOSIT FUNDS GREATER THAN \$950

On or about and between March 29, 2019 and May 4, 2020, [REDACTED] being a seller of travel, did unlawfully encumber the corpus of a trust account containing monies received for travel and transportation services from passengers, as specified in Business and Professions Code section 17550.15, to wit: [REDACTED] --ATTACHMENT 1 for [REDACTED] STUDENTS EAST COAST TRIP 2020, and further The money received and obtained by defendant for transportation and travel services from any and all persons aggregated exceeded two thousand three hundred fifty dollars (\$2,350) in a consecutive 12-month period., in violation of Business and Professions Code sections 17500.15(c) and 17550.19(6).in violation of BUSINESS AND PROFESSIONS CODE SECTION 17550.15(c).

# Seller of Travel: Penalties for Non-Compliance

COUNT 2 - SELLER OF TRAVEL - FAILURE TO RETURN FUNDS >\$950

On or about and between April 4, 2020 and December 20, 2020, [REDACTED] being a seller of travel, and having received from a passenger moneys for air and sea transportation and travel services, did unlawfully fail to provide the transportation and services purchased and to make a refund to the passenger within the periods specified by Business and Professions Code Section 17550.14, and further, the money, real, and personal property received and obtained by the defendant for transportation and travel services from any and all persons aggregated exceeded two thousand three hundred fifty dollars (\$2,350) in a consecutive 12-month period, to wit: PARENTS OF [REDACTED] STUDENTS -- ATTACHMENT 1 in violation of BUSINESS AND PROFESSIONS CODE SECTIONS 17550.19(b) AND 17550.14.

# Seller of Travel: Penalties for Non-Compliance

COUNT 3 - GRAND THEFT OF PERSONAL PROPERTY

On or about and between March 29, 2019 and December 20, 2020, [REDACTED] did unlawfully take and steal money and personal property of PARENTS OF [REDACTED] STUDENTS -- ATTACHMENT 1, of a value in excess of Nine Hundred Fifty Dollars (\$950), in violation of PENAL CODE SECTION 487(a).

A background image showing a city skyline at sunset, with the Transamerica Pyramid prominently visible. In the foreground, several tall, purple, spiky flowers are in focus. A blue diagonal shape is overlaid on the bottom left corner.

# *Trademarks*

# What is a Trademark?

- A trademark is a word, phrase, design or symbol, or combination thereof, that identifies the source of the goods of one party and distinguishes those goods from the goods of others. A service mark identifies and distinguishes the source of services rather than goods. The term “trademark” is often used to refer to both trademarks and service marks



# Choosing a Strong Trademark

- Trademarks can generally be categorized into one of four categories of distinctiveness,
- Trademarks come in two types: (a) “inherently distinctive” and (b) “not inherently distinctive.”
- Inherently distinctive trademarks are fanciful, arbitrary, or suggestive in relation to the products or services with which the mark is used.
- Words and designs that lack any distinctiveness fall into a fifth category, “generic,” and cannot function as trademarks





# Trademark Clearance

- Before spending money on registering the Trademark, you should complete a search to see if the name is already in use.
- For marks to be used solely in the United States the minimum standard in most circumstances is a search for the proposed mark (and marks similar in sight, sound and meaning) in the U.S. federal and state trademark databases and various common law resources.
- If no searching is done, and the mark you adopt infringes someone else's mark, your adoption of the mark may be deemed "willful infringement," which can triple the amount of damages you must pay to a trademark owner and may also subject you to payment of the trademark owner's attorneys' fees.



# Trademarking Process

- Determine the mark's format
- Identify the goods or services to which the mark will apply
- Determine if the mark is already being used
- Submit application to the USPTO
- Monitor application through Trademark Status and Document Review (TSDR) system
- Check the status every 3-4 months as to not miss a filing deadline – timely process
- Receive approval or denial of your application



# Trademarks: Use it or Lose it

- In the United States trademark rights are established as a result of use of the trademark. Accordingly, if you sell products or provide services in connection with a trademark or brand name you are developing trademark rights. These so-called “common law rights” develop over time. Likewise, in order to maintain trademark rights, the trademark must stay in use, and must appear prominently and consistently on the goods or services.



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# *Thank You For Your Time*

*See you soon...*

## What Can a Travel Lawyer Do For Your Business?

- Contract Drafting/Review/Analysis
- IC Agreements
- Terms and Conditions
- Planning Fee Agreement
- Vendor Agreements
- Group Contracts
- Litigation/Claim Management
- Defense of Serious Injury Claims
- Risk Management
- Trademark Law
- Seller of Travel
- ARC/CLIA/IATAN accreditation

