

Firing a Subcontractor

by Quenda Behler Story

Many contractors find it more efficient to hire subcontractors instead of employees. Unlike employees, subcontractors aren't entitled to unemployment benefits or workers compensation, and subs are only paid when their skills and abilities are needed. Also, hiring a subcontractor is often the only way to obtain specialized expertise and equipment, and to benefit from special licenses not available to you and your employees.

But there's another significant difference that can be a problem. It comes into play when the general contractor is dissatisfied with the work being done. If a contractor finds himself working with an underperforming subcontractor and wants to end the relationship, he cannot simply fire him. A subcontractor is not an employee.

Cancellation. When a contractor "fires" a sub, what he is actually doing is canceling the contract. This can have serious consequences, because when a contractor prevents a subcontractor from performing his work, that's a breach of contract. In most states the subcontractor can sue for breach of contract, even if there isn't a written contract in force.

Standards of the Trade

Allow me to introduce Sam, a cabinet installer working as a subcontractor for John, a general contractor. Sam has almost finished installing the cabinets per their verbal agreement, but his miter cuts on the crown molding are not very well matched, he was rude to the homeowners, and he left the job site littered with trash. The homeowner is so mad that John's afraid he'll lose his contract, so he tells Sam to get off the job and not come back. An angry Sam heads straight for his lawyer's office, and sues John for breach of contract. Does John have any

defenses to this action?

Maybe, but probably not as many as he thinks he has. John cannot terminate a subcontract simply because he didn't like the work. To terminate the contract and still avoid liability for breaching it himself, John has to show that the subcontractor failed to live up to the terms of the contract, either by not performing, or by not meeting the "standards of the trade" for that type of work.

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Notice I said "standards of the trade," not John's standards. John has a problem if his standards are higher than most other contractors, and he failed to spell this out in the agreement with Sam. The law says that Sam is meeting his contractual obligations if he's producing work that meets the standards of the trade.

Good enough? John may take pride in delivering better-than-average work to his customers, but this higher standard does not obligate Sam to do a better job. "Standards of the trade" means work that's "good enough," and Sam's contractual obligations would be fulfilled if his work was acceptable to most contractors.

What about the dirty job site? Once again, John has a problem. If the con-

tract doesn't specify that Sam must clean up the job site, Sam can't be terminated for leaving a mess on site. The "standards of the trade" reference usually does not include cleaning up the job site.

Even though Sam was rude to the homeowner, John cannot terminate his contract for that. However, if Sam had signed a written contract that required him to meet the behavior standards in John's employee handbook, then John might have a case. Remember that Sam was only rude, not threatening or belligerent, which would have created a different situation.

Pay the Penalty

Should Sam prevail in his breach of contract action, this doesn't mean he automatically wins the full contract price. The law would recognize that the work Sam didn't complete has saved him some expenses, and that he now has free time to work on another job. But Sam is entitled to his lost profit on John's job.

Sam can also ask for consequential or economic damages, depending on state law. This would cover the out-of-pocket expenses he would not have incurred if John hadn't breached the contract. For example, if Sam had to spend a lot of time and money looking for another job to fill the time slot allotted to John, or if it's simply too late to get another job for that time period, Sam can ask for compensation, and he may be entitled to it. Sam would also be entitled to some reimbursement for his legal expenses incurred in bringing the action against John.

Get It in Writing

How can a contractor avoid being caught this way? Start by using a written contract for all of your subcontractors, and use it every time out. Make

sure it includes a defined scope of work, as well as a description of the standards that you will hold them to, such as how much time is to be spent on the job, rules for job site safety and cleanup, guidelines for communicating with the owners, expectations for handling materials and following

manufacturers' installation requirements, plus any other factors you deem relevant.

Also keep good records. If things begin to go astray, there is no substitute for a written job log. Write down when, where, and how the contract terms are being violated. If you find that the only

alternative is hiring someone else, you'll at least avoid paying twice for the work.



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