

## Letter of Guidance - Clarification of: Third Party Arrangements, Booking Agents, Employment Relationships, Leasing / Use of Employee's Equipment, & Advertising

January 25, 2008

The Idaho Outfitters and Guides Licensing Board (Board) has become aware of a growing number of issues involving Idaho outfitters that have largely been brought about by the ease by which web-based advertising can be developed. This has spawned a new generation of inappropriate third party arrangements where outfitters are sometimes not aware their employees are engaged in direct advertising for outfitting and guiding services, often as booking agents. There are instances where designated agents and guides, working for one or more outfitters, are advertising independently of their employing outfitters. By doing this, these designated agents and guides have become engaged in the very acts that are limited only to outfitters under Idaho Code, Section 36-2102. Associated with this are instances where outfitters are not establishing proper employment relationships with their designated agents and guides, and by doing so, are not clearly taking responsibility for them as the employing outfitter. As a result, the Board is concerned that the historic concept of an "outfitter" in this state may be eroding, and that the outfitter operating area system, which is unique only to Idaho, could be at risk. With this system, using Idaho's resources wisely, protecting the public at large, and maintaining a fair playing field for the industry as a whole to do business, is paramount. The Board believes that unless something is done soon, the stability of the outfitting and guiding industry in Idaho may suffer.

Pursuant to the Board's direction, this document is intended to provide guidance to Idaho's outfitters to help them understand existing statutes and rules relative to these matters, and to help them avoid circumstances involving inappropriate "third party" agreements that could bring into question their compliance with basic requirements of licensure as explained in Idaho Code, Title 36, Chapter 2.

This guidance letter provides the Board's interpretation of the existing statutes and rules applicable to third party agreements and arrangements. The Board's staff will utilize this guidance letter in future matters to determine whether there has been a violation of statutes and/or rules applicable to third party arrangements. The failure of any licensed outfitter or guide to comply with the statutes and/or rules as interpreted by the Board pursuant to this guidance letter could subject the licensee to enforcement and/or disciplinary action.

Pursuant to Idaho Code, Section 36-2102, an "**outfitter**" is any individual (sole proprietor), or any firm, partnership, corporation or other organization who, while engaging in any of the acts enumerated in the statute in any manner:(1) advertises or otherwise holds himself out to the public for hire; (2) provides facilities and services for consideration; and (3) provides or otherwise uses equipment or accommodations for compensation for the conduct of outdoor recreational activities. **Thus**, an "outfitter" is the business entity. A "**designated agent**" is any natural person who is employed by a licensed outfitter, who is responsible for the outfitter's business operation. A "**guide**" is any natural person who is employed by a licensed outfitter to furnish personal services for outdoor recreational activities directly related to the conduct of activities for which the employing outfitter is licensed.

IDAPA 25.01.01.002.06 states that a "**booking agent**" is: "Any individual, firm, business, partnership, or corporation that makes arrangements for the use of the services of a licensed outfitter and receives compensation therefore. A booking agent does not supply personnel or facilities and services to outfitter clientele."

*Guidance: A booking agent is an independent business entity established to market and book excursions for outfitters for compensation through an agreement with the outfitter. Booking agents cannot provide personnel or facilities and services to outfitter clientele. In contrast, both a designated agent and a guide are employees of the outfitter business. A "designated agent" is the employee who is responsible for the outfitter's business operation and a guide is licensed to the specific outfitter(s) to furnish personal services for the conduct of outdoor recreational activities. Although the Board does not regulate booking agents, it does regulate outfitters, designated agents and guides. Therefore, neither a designated agent nor a guide can advertise to provide outfitted or guided services, or collect fees from clients unless these acts are performed under the direct authority and supervision of the outfitter. An individual seeking to be a booking*

*agent and designated agent or guide must keep the activities of a booking agent and a designated agent or guide entirely separate. Any employee of an outfitter also conducting business as a booking agent cannot provide guided services to the clients they have booked for their employing outfitter. Doing so would constitute an illegal third party arrangement. Outfitters are not restricted from utilizing independent booking agents who do not attempt to provide personnel, facilities, or services to the outfitter's clientele.*

*In contrast, any employee of an outfitter may advertise, negotiate, or market licensed activities for the outfitter. In doing so, all advertisements must be authorized by the outfitter, must identify the outfitter's business by the licensed name and indicate the activities that will be provided by the outfitter. All "booking" paperwork must identify the responsible outfitter and all monies collected must be deposited in to a financial account owned and controlled by the outfitter. The "booking" paperwork must be in the name of a specific client as "payment received" by the outfitting business. These clients must clearly be clients of the outfitter covered under the outfitter's insurance and bond. Designated agents and guides cannot deduct a fee collected from the receipt of payment and then later provide the remaining amount to the outfitter. Similarly, designated agents and guides cannot book a trip and then pay the outfitter a portion of the fee collected in order for the guide to legitimize the trip under an outfitters name, bond and insurance.*

*Finally, a guide can make unsolicited arrangements for an outfitted trip, provided it is clearly represented to the client the services are provided by the outfitter and not the guide; provided all client information and finances are otherwise handled properly and directly by the outfitter as explained herein. This is known as a "client deferral". In this scenario, guides can provide services to the clients for the outfitter to whom they are licensed. This is often done when clients want to extend an existing trip another day such as a fishing trip.*

**Third Party Agreements:** The IOGLB rule IDAPA 25.01.01.023 – Third Party Agreements – states, “[a]n outfitter shall not sublet, or enter into any third party agreements involving the use of his activity (ies), operating area(s), or license.”

- “1 Employed – “No licensed outfitter shall allow any person to conduct any of the activities for which he is licensed unless said person is employed directly by the outfitter as a guide.”
- “2 No Activities – “No person shall conduct any outfitted activities for, or on behalf of, a licensed outfitter, unless said person is directly employed as a guide by the outfitter to whom the operating area(s) and activity (ies) are licensed.”
- “3 Other Activities – “Any arrangement wherein an outfitter licensed to conduct outfitted activity(ies) in an operating area(s) knowingly allows, condones, or otherwise abets and supports the conduct of outfitting activity(ies) by another, wherein said outfitter does not assume full and complete responsibility for all clients booked for such activity(ies), shall constitute an unlawful third party agreement. Complete responsibility includes providing liability insurance to cover the client, collection of fees paid for the activity (ies), payment of user fees and taxes, and making the client aware as to who is the responsible outfitter(s). Such unlawful activity (ies) shall be grounds for discipline as unethical and unprofessional conduct, in addition to any other penalties which may be assessed for violations of these Rules or the laws of the state of Idaho.”
- “4 Booking Agent – “This rule shall not be deemed to apply to the conduct of a booking agent, nor to an agreement between two (2) or more outfitters in which the outfitters provide services to the same party or parties within their respective operating areas.”

*Guidance: (Employer/Employee Relationship). To understand “third party agreements,” one must recognize the differences between an employee and an independent contractor. The Internal Revenue*

*Service and the Idaho State Tax Commission have clarified the differences between employees and independent contractors. An employer is any person, business, or organization for which an individual performs any service as an employee. This includes religious, educational, charitable, and social organizations or societies, even if the organizations are exempt from paying income taxes. Generally, an employee is any individual who performs services for an outfitter when the outfitter has the right to control what will be done and how it will be done. This is true even when the outfitter chooses not to exercise their control over the employee and allows the employee substantial freedom in the performance of their duties. The employer-employee relationship is not altered by the method of payment or whether the employee works full-time or part-time. If an employer/employee relationship exists, it does not matter what the relationship is called. Employees do not solicit work through advertising; they are paid by the hour; day; week or month; and they normally use equipment provided by the employer. Generally, if someone performs services for the outfitter, he is an employee. In contrast, independent contractors solicit work through advertising; are paid by the job performed; relationships last a limited time and provide their own equipment (See “04. Agreement” provided below). Therefore, an outfitter is the business and the employer. Designated agents and guides must be “employees” of the outfitter business. **There are no exceptions.***

*To summarize: The licensing outfitter business is the first (1st) party, the designated agent or guide employed by a licensed outfitter is the second (2nd) party, and the third (3rd) party is any individual booking agent or representative of the booking agent who is advertising or booking trips independently of the outfitter.*

**Employment of Outfitters:** IDAPA 25.01.01.008 allows outfitters to guide for another outfitter and to rent or lease equipment or services as follows:

- “1 Other Outfitter. An outfitter may guide for another outfitter when properly employed by that outfitter, provided that both the employee and employer licenses contain a statement indicating Board approval for such guiding to occur.” *This must be done by amending the “employed” outfitter’s guide license.*

*Guidance: An outfitter who hires another licensed outfitter or designated agent as his guide (employee) must have documentation to establish the outfitter-guide is an employee, such as W-2 and W-4 forms filled out in advance. He should also be prepared to show that he compensated his employee with wages paid and reported.*

- “2 Other. If an outfitter is employed to guide activities not covered by his own guide license, he must first submit his qualifications to the Board for approval along with the certification required from the employing outfitter prescribed in Subsection 034.02.”

- “3 No Sharing of Profits. While an outfitter is employed as a guide by another outfitter, there shall be no sharing of profits or equipment and/or animals other than leased equipment and/or leased animals. An outfitter when employed as a guide may only render personal services, as would any other guide.”

*Guidance: The exemption provided in IDAPA 25.01.01.023.04 (“Third Party Agreements” – as outlined above) does not apply here. An outfitter may be a booking agent for other outfitters provided the procedures as outlined above are followed and the booking agent outfitter does not provide services to clients they booked in the other outfitter’s area. There must be two separate booking agreements for shared clients – one for each outfitter. In rare instances, such as during fire emergencies, the Board may allow an exemption(s). This can be done only through prior written authorization from the Board, and it must be approved by the Board prior to providing any outfitted guiding services.*

“04. Agreement. When an outfitter utilizes equipment from another outfitter or a guide in the provision of facilities, services and transportation to clientele, a “written notice of usage” shall be filed with the Board including a current certificate or proof that the outfitter’s clientele will be covered by the outfitter’s general liability insurance when utilizing the leased equipment.

***Guidance: (Lease or Use of Equipment).** Outfitters cannot allow employees to use the employee’s personally owned equipment in order to provide outfitted or guided services to clients, examples include: facilities (lodges, tents, cooking equipment, etc), services (hunting, or fishing equipment, dogs and hounds, etc) or transportation (horses, tack, pack equipment, vehicles, boats, etc.). Equipment must be provided by the outfitter unless the outfitter is leasing equipment owned by the employee. If the outfitter is leasing equipment from a guide, the outfitter must submit along with a guide application a “written notice of usage.” This will be kept in the guide’s licensing file. To clarify, a “written notice of usage” must be in the form of a written rental agreement or a written lease agreement. Either shall identify the equipment that is being provided to the outfitter; the terms of payment for the use of the equipment, and the period it is being provided. Rental or lease equipment payments paid to the guide cannot include payment for outfitted or guided services provided by the guide and must be identified separate from the wages paid to the guide and must be within the prevailing lease rate typical of the area for similar equipment. Typically, guides are expected to provide and use some of their own personal equipment while in the employ of an outfitter; such as clothing, saddles, binoculars, spotting scopes, axes, fire arms, knives, etc and should expect do so without compensation other than their wages. This equipment can also be provided to the guide by the outfitter.*

***Guidance: (Advertising)** - All advertising must clearly identify the outfitted or guided service is being provided by the licensed outfitter in the river, lake or land area where that outfitter is licensed. Any identification markings on leased or rented equipment related to any booking agent, guide or outfitter other than the employing outfitter must be removed, marked out or concealed so only the name of the licensed outfitter is visible. The requirements for outfitter advertising on boats are set forth at IDAPA 25.01.01.054.03.*

As a “safe harbor” approach to preventing inappropriate third party arrangements or agreements, an outfitter business should consider the following issues:

1. Take control of direct advertising and/or marketing of all outfitted and guided activities and excursions by:
  - a. **The outfitter conducting** the advertising / marketing / booking of clients;
  - b. **Require designated agents and guides** to advertise / market / book clients only in the name of the outfitter using the outfitters license name;
  - c. **Recognizing and maintaining a separation between employees acting as booking agents** and the handling of outfitter’s business receipts and providing services to clients.
2. Have all booking paperwork identify the outfitter using the outfitters license name;
3. Have all monies handled by guides or designated agents deposited directly into an account owned and controlled solely by the outfitter;
4. At a minimum, issue an outfitter business receipt to all clients; or preferably, incorporate and use with all clients a standard written agreement that outlines the general terms of the services provided by the outfitter business. Specific services should be identified for individual clients and then outlined in the aforementioned agreement. A default clause should be included.
5. All outfitter businesses entities that have employees must have a “Federal Employment Identification Number (FEIN) . This is a nine-digit number that is issued by the IRS and is requested by the Board during licensing.

The FEIN is used commonly by most other professional licensing boards and other employment/labor related agencies in Idaho to identify business entities and the employer registered with the state. Outfitters conducting business as sole proprietors and who do not have employees would continue provide only their Social Security number as in the past. Because these outfitters have no employees, they would not have a FEIN to provide. How to obtain this number and information on reporting requirements can be obtained from the Idaho Department of Labor at (208) 332-3579 or toll free at 1-800-843-3193 and the Idaho State Tax Commission at (208) 334-7660 or toll free at 1-800-972-7660. or the Idaho Industrial Commission at (208) 334-6000 or toll-free: 1-800-950-2110

6. Assign and pay a wage to a licensed guide by the use of a payroll system, ensure that all state and federal employee requirements are met and that you maintain and file all required employer/employee forms, such as W-2 and W-4 forms, and maintain unemployment insurance and keep records.
7. Ensure that you have obtained and maintain a current policy of Idaho workers' compensation insurance to cover all of your employees (designated agents and guides) as required by Idaho Code § 72-301. This requirement applies even if the employee is not paid a wage, but only receives remuneration in the form of some material benefits, such as food and lodging or the use of the outfitters equipment while performing services as an employee for the outfitter. You must have a policy of insurance for the entire "period" that you have employees; not just for the days, they are actually performing services. Part-time employees and seasonal employees must also be covered. There are a few limited exemptions, such as for certain family members of a sole proprietor owner. Any questions you have about coverage under this law should be directed to the Compliance Bureau of the Industrial Commission at (208) 334-6000 or toll-free: 1-800-950-2110. Severe penalties and serious consequences can result for your failure to comply with this law."