INDEPENDENT CONTRACTORS OR EMPLOYEES?

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EMPLOYEE OR INDEPENDENT CONTRACTOR – THE GENERAL RULE

In determining whether a person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence of the person must be considered. Making the correct determination regarding the appropriate classification of an individual performing services for a school district is very important. Generally, the District must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment taxes on wages paid to an employee. The school district does not generally have to withhold or pay any taxes on payments to independent contractors but must issue a Form 1099 to independent contractors. If the District incorrectly classifies an employee as an independent contractor, it can be held liable for employment taxes for that worker, plus penalties and interest, which can sometimes equal more than three times the employment taxes that should have been withheld.

In determining the employment status of a person performing work for an employer, a general rule is that the employer has the right to control or direct only the result of the work done by an independent contractor, and not the means and methods of accomplishing the result, as it would with an employee. Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties.
**Behavioral Control.** Facts that show whether the business has a right to direct and control the behavior of the individual performing services include:

1. Instructions: An employee is generally told when, where, and how to work, which includes:
   - what tools or equipment to use;
   - what workers to hire or to assist with the work;
   - where to purchase supplies and services;
   - what work must be performed by a specified individual; and
   - what order or sequence to follow.

2. Training protocols and procedures: An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods. The more frequently and/or intense the training, the more it indicates employer control.

3. Evaluation systems: If the evaluation measures how the work is performed, this indicates an employee. If the evaluation measures just the end result, this could indicate an employee or an independent contractor.

**Financial Control.** Facts that show whether the business has a right to control the business aspects of the worker’s job include:

1. The extent to which the worker has unreimbursed expenses. Independent contractors are more likely to have unreimbursed expenses than are employees.

2. The extent of the worker’s investment. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

3. The extent to which the worker makes services available to the relevant market. An independent contractor is generally free to seek out business opportunities with other employers.

4. How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. An independent contractor is usually paid a flat fee for the job. However, it is common in some professions to pay independent contractors hourly.

5. The extent to which the worker can realize a profit or loss.
**Type of Relationship of the Parties.** Facts that show the type of relationship between the parties include:

1. Written contracts describing the relationship the parties intended to create. However, the actual nature of the relationship between the two parties will prevail over the written documents, if inconsistencies exist.

2. Whether the worker is provided with employee-type benefits such as insurance, a pension plan, vacation pay, or sick pay.

3. The permanency of the relationship. If a business engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.

4. How integral the services are to the principal activity. If a worker provides services that are a key aspect of the entity’s regular business activity, it is more likely that the business will have the right to direct and control his or her activities.

5. Characterization of similar relationships. If other individuals in the position have been considered an employee, it is likely that all future individuals in that position will be considered employees. Likewise, if other districts typically classify that type of worker as an employee, the worker will be considered an employee.

*The information in this handout was prepared by Walsh, Anderson, Gallegos, Green and Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*