SCHOOL DISTRICTS’ USE
OF INDEPENDENT CONTRACTORS

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School districts’ and other employers’ use of independent contractors increasingly is being scrutinized by federal government and state government agencies. Various researchers have estimated that 10% - 50% of workers classified as independent contractors actually are employees. In 2009, the United States Government Accountability Office (GAO) estimated that independent contractor misclassification costs the federal government approximately $2.72 billion in lost revenues annually. Misclassification also costs employees substantial sums in lost benefits, overtime and extra payroll tax liability. Consequently, state and federal agencies increasingly audit employers for compliance with classification laws, and impose penalties on employers and employees in cases where misclassification is found. For these reasons, it is important for school districts to be familiar with the legal criteria for proper classification of workers as independent contractors.

Different agencies use different tests for determining whether a worker is an independent contractor. The four tests which school districts most often will confront are discussed below.

I. **THE 20-FACTOR COMMON LAW CONTROL TEST**

The Internal Revenue Service and the Social Security Administration use the common law test to determine whether a worker is an independent contractor. The common law test essentially considers the degree of control that the employer exercises over the worker.

Until recently, the Social Security Administration and the Internal Revenue Service both applied a 20-factor test when determining whether a worker is an independent contractor. The IRS recently reorganized the factors that it examines under the common law rule, but the SSA still applies the 20 factors. The factors collectively govern whether a worker is an independent contractor or an employee; that is, not all of the factors must be present for a worker to be an independent contractor.

The more of the following factors that are present, the more likely it is that a worker will be found to be an independent contractor:

1. **Instruction:** The employer does not instruct the worker when, where and how to perform the work.
2. **Training:** The employer does not train the worker.
3. **Integration:** The worker’s services are not part of the employer’s core business.
4. **Personal Services:** The worker is not required to personally perform the work.
5. **Assistants:** The worker may hire and pay assistants or subcontractors to help perform the work. If the worker does so, the worker is responsible for supervising them.
6. **Duration of Relationship:** The worker’s relationship with the employer is for a finite duration that is not lengthy.
7. **Hours of Work:** The employer does not set the hours of work.
8. Full-time Status: The worker is not required to work full-time for the employer.

9. Location: The worker is not required to be on the employer’s premises.

10. Sequence or Order of Work: The employer does not decide the sequence or order in which the worker does the work.

11. Reports: Regular written reports by the worker to the employer are not required.

12. Manner of Payment: The worker is not paid hourly, weekly or monthly.

13. Expenses: The worker is not reimbursed by the employer for expenses.

14. Tools and Materials: The employer furnishes no tools, materials or equipment to the worker to do the job.

15. Investment: The worker significantly invests in the equipment and premises used when performing the services.

16. Profit or Loss: The worker may realize profit or loss.

17. Multiple Clients: The worker may work for multiple employers simultaneously.

18. Availability to the Public: The worker makes services available to the general public, as by advertising.

19. Right to Discharge: The employer cannot discharge the worker at will before completion of their contract. However, an independent contractor may be discharged for failure to perform in accordance with contract requirements.

20. Right to Quit: The worker cannot end the relationship with the employer at will before completion of their contract.

In addition, two factors that are not expressly included in the 20-factor list, often are considerations under several of the 20 listed factors.

21. Same Work as Employees: A worker is more likely to be an independent contractor if the worker does not perform the same work as employees of the employer.

22. Previous Employment: A worker is more likely to be an independent contractor if the worker has not been previously employed by the employer to do similar work.

II. THE REVISED COMMON LAW CONTROL TEST

Although the IRS still uses the common law control test, it recently reorganized the 20-factors. As with the 20-factor common law control test, the absence of one or more factors is not determinative.
The more of the following factors that are present, the more likely it is that a worker will be found to be an independent contractor:

1. Behavioral Control – The employer does not have the right to direct and control how the worker does the work.
   a. Instructions that the Employer Gives to Worker: The worker is not subject to the employer’s instructions about the details of when, where and how to work.
   Examples of such instructions include:
      • When and where to do the work
      • What tools or equipment to use
      • What workers to hire to assist with the work
      • Where to purchase supplies and services
      • What work will be performed by a specified individual
      • What order or sequence to follow
   b. Training that the Employer Gives to Worker: The employer provides no training to the worker.

2. Financial Control – The employer does not control the business aspects of the job.
   Examples of this include:
   a. The employer does not reimburse the worker’s expenses.
   b. The worker has a significant investment in the facilities or tools that are used to perform the work.
   c. The worker makes his or her services available to the relevant market, as through advertising and maintaining a visible business location.
   d. The worker is not guaranteed a regular wage amount for an hourly, weekly or other period of time.
   e. The worker may realize a profit or loss.

3. Type of Relationship – The nature of the worker’s relationship with the employer indicates the worker is not controlled by the employer. Examples of this include:
   a. A written contract describes the relationship that the parties intended to create.
   b. The employer does not provide the worker with benefits, such as insurance, pension, vacation or sick pay.
   c. The relationship’s duration is finite and not long-term.
d. The services performed by the worker are not a key aspect of the employer’s services.

III. THE ECONOMIC REALITIES TEST

The United States Department of Labor uses the economic realities test when determining whether workers are properly classified as independent contractors. Unlike the common law control tests that analyze the employer’s degree of control over the worker, the economic realities test considers whether the worker is dependent on the employer as a matter of economic reality. The factors applied under the economic realities test are fewer, but broader than under the common law control tests. As with the common law control tests, the presence or absence of one factor is not determinative under the economic realities test.

The more of the following factors that are present, the more likely it is that a worker will be found to be an independent contractor:

1. The work performed is not an integral part of the employer’s business:

   If the work performed by a worker is not integral to the employer’s business, the worker is less likely to be economically dependent of the employer and, therefore, an independent contractor.

2. The worker’s opportunity for profit or loss depends on his or her managerial skill:

   The more that a worker’s managerial skill and decisions will affect his or her profit or loss, the more likely that the worker is an independent contractor. Evidence of this includes the worker’s discretion to hire others, to purchase materials and equipment, to advertise, to rent space, and to manage the timing with which the work is performed.

3. The worker’s investment in performing the work is significant compared to the employer:

   The more that a worker makes an investment and, thereby risks losing money, the less likely it is that the worker is economically dependent on the employer. Investment by the worker in his or her business as a business, rather than just in a particular job, is indicative of independent contractor status.

4. The work performed requires special skill and initiative:

   A worker’s business skills and judgment, not technical work skills, are considered in determining whether the worker is economically independent. For example, the more that the worker has discretion to determine the sequence in which work is performed, the quantity of materials to order, and how to market his or her services, the more likely it is that the worker is an independent contractor.

5. The worker’s relationship with the employer is not permanent or indefinite:
The more finite and short-term the worker’s relationship is with the employer, the more likely it is that the worker is not dependent on the employer and is an independent contractor. Workers who work until they quit or are terminated, and workers who contract for longer than one year, usually will not be independent contractors.

6. The employer’s control over the worker is limited in nature and degree:

The worker must control meaningful aspects of the work performed in order to be economically independent from the employer. Evidence of such independence may include the worker having discretion to decide how to do the work, which individuals (including assistants and subcontractors) will perform the services, how many employers the worker will serve simultaneously, whether the worker is free to negotiate the amount of his/her compensation from the employer, and whether the worker determines when to perform the work.

IV. THE NEW HAMPSHIRE SEVEN-PRONG TEST

RSA 275:4, II, and other New Hampshire statutes create a presumption that a worker is an employee. The statutes recognize that the presumption of employee status may be rebutted if all seven of the following requirements are satisfied. Unlike the control tests and the economic realities test, a worker will not be found to be an independent contractor if any of the seven requirements are unsatisfied.

1. The worker possesses or has applied for a federal employer identification number or a social security number, or alternatively has agreed in writing to fulfill the responsibilities imposed on employers under RSA 275.

2. The worker has control and discretion over the means and manner of performing the work in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

3. The worker has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this does not prohibit the employer from agreeing with the worker on a completion schedule, range of work hours, and maximum number of work hours to be provided by the worker.

4. The worker may hire and pay assistants and, if the worker’s assistants are employees, the worker will supervise the details of the assistants’ work.

5. The worker holds himself or herself out to be in business for himself or herself or is registered with the state as a business and has continuing or recurring business liabilities or obligations.

6. The worker is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

7. The worker is not required to work exclusively for the employer.
V. CONCLUSION

The criteria for independent contractor status under all of these tests are somewhat similar and somewhat subjective. Most school districts that are cited for misclassifying workers as independent contractors fail to meet several criteria under each test. In particular, districts often are cited for misclassification of special service providers such as school psychologists, nurses, occupational therapists and physical therapists. Years ago such service providers were not considered to be part of a district’s core educational mission; however, with the expansion of special services over the last four decades, federal and state agencies now regard these as core or integral services.

School districts should review their independent contractor relationships under each of the tests discussed above. When districts conclude that workers have been misclassified as independent contractors, they either should modify aspects of the relationships so that the workers may be properly classified as independent contractors or they should reclassify the workers as employees.