



ROWLAND UNIFIED SCHOOL DISTRICT

INDEPENDENT CONTRACTOR OR EMPLOYEE? COMMON LAW ASPECTS

The following are summarized common law factors which may be useful in making a determination:

1. In general, individuals in business for themselves are not employees. For example, physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and others who follow an independent trade, business, or profession in which they offer their services to the public are not employees.
2. If an employer/employee relationship exists, describing the relationship as anything other than that of employer and employee is immaterial. It does not matter that the employee has been designated as a partner, co-adventure, agent, or independent contractor; nor does it matter how the payments are measured or how they are made, or what they are called; nor whether the individual is employed full or part time. In other words, what is actually going on will supersede what a contract might state.
3. Anyone performing services subject to the will and control of an employer is an employee. Must the person do what the employer may direct? Can the person be fired?
4. The existence of a continuing relationship between an individual and a person for whom he performs services is a factor tending to indicate the existence of an employer/employee relationship. Services may be continuing, even though they are performed at irregular intervals on a part-time basis, seasonally or over a short term.
5. If services must be rendered personally; for example, the contract is with a corporation but services are performed by an individual, and if the employer is interested in who does the job as well as in getting the job done, it indicates that the employer is interested in the methods used as well as the result of the services rendered.
6. Integration of the person's services into the business and operations generally shows that he is subject to direction and control.
7. Doing the work on the employer's premises is not in and of itself indicative of control, but it does imply control, especially if the work is of such a nature that it could be performed elsewhere. One who works in the employer's place of business is at least physically within the employer's direction and supervision. Conversely, however, the fact that the work is done on the employer's premises does not of itself mean that a right of control exists.
8. Payment for work by the hour, week, or month is usually the manner for compensating employees. Independent contractors are customarily paid by the job in a lump sum or on a commission basis. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earning tends to indicate the existence of an employer/employee relationship.

LIABILITY ASPECT

If a person employed as an independent contractor; 1) suffers an injury, 2) is the cause of an injury to others, or 3) due to negligence or action caused a financial loss, would the employer likely be held liable because a court could rule that the person was an employee (without regard to the contract and even in spite of a hold harmless clause in a contract)?

If this is a reasonable conclusion beforehand, should the individual be an employee from the outset.

Final note: Whenever an individual is to be treated as an employee, options exist as to hiring on a limited-term, short-term, or other basis or category of employment.



ROWLAND UNIFIED SCHOOL DISTRICT

INDEPENDENT CONTRACTOR OR EMPLOYEE? DISTRICT GUIDELINES

When contracting with an individual for services the district must establish the nature of the employment relationship. This should occur prior to any services being performed and issuance of any payment. Once the legal relationship is determined, the method of payment is prescribed by law. The problem occurs in the area of who is or is not an employee. There is no clear cut definition of what constitutes an employee. Instead, there are the twenty common law factors that must be analyzed by the district and the district makes the determination.

IRS Publication SWR 40, Public Schools and Employment Taxes, lists workers that have already been determined by IRS to be employees. These are individuals performing the duties of:

- administrators
- teachers/instructors
- substitutes
- school bus drivers
- clerical staff
- athletic coaches
- tutors
- cafeteria workers
- counselors
- examination monitors
- proctors
- librarians

In addition to the categories above, the revenue agent recently reclassified the following categories as employees:

- nurses
- psychologists
- intern psychologists
- Individuals "filling in" on an interim basis
- specialty teachers (art, poetry, music, etc.)

What the district calls the individual is irrelevant to the analysis of the employment relationship. The IRS looks at the facts and the relationship on a case by case basis.

If the individual in question is not in one of the above categories, you may use the guidelines on the following pages to analyze the employment relationship between the district and the individual. We recommend the completed guidelines be kept on file with the district consultant contract for any future IRS inquiries. The 20 common law factors have all been considered in developing the attached questionnaire.

INDEPENDENT CONTRACTOR OR EMPLOYEE? DISTRICT GUIDELINES

Name of individual under consideration _____

Part I

1.	<p>Has this category of workers already been classified an "employee" by the IRS? <i>Refer to page 2 for individuals listed in IRS Publication SWR 40 and others identified during the IRS compliance studies in San Diego County.</i></p>	<input type="radio"/> YES <input type="radio"/> NO
2.	<p>Is the individual working as an employee prescribed by the Education Code? <i>Education Code sections 45100-45451/88000-88263 define what constitutes classified service and 44800-45060/87000-87333 define certificated service. The IRS predisposes an employer/employee relationship when state law mandates such a relationship.</i></p>	<input type="radio"/> YES <input type="radio"/> NO
3.	<p>Is the individual already an employee of the district in another capacity?</p>	<input type="radio"/> YES <input type="radio"/> NO
4.	<p>Has the individual performed substantially the same services for the district as an employee in the past? <i>Is the individual retired, returning to substitute, or train, etc.?</i></p>	<input type="radio"/> YES <input type="radio"/> NO
5.	<p>Are there currently employees of the district doing substantially the same services as will be required of this individual?</p>	<input type="radio"/> YES <input type="radio"/> NO
6.	<p>Does the district have the legal right to control the method of performance by this individual? <i>Consider whether the district has to train this individual or give instruction as to when, where, how, and in what order to work. Does the district require the individual to submit reports or perform the services at a district site? These factors would indicate the district maintains control sufficient for an employer/employee relationship. However, it is <u>not necessary</u> that the district <u>exercise</u> this right or have the expertise required to do so. In many cases this would not be practical nor advisable.</i></p>	<input type="radio"/> YES <input type="radio"/> NO
7.	<p>Are the services, as being provided, an integral part of school operations? <i>Are the services being provided necessary to the operation of the school, program, project, etc.? This indicates the district has an interest in the method of performance and implies the maintenance of legal control.</i></p>	<input type="radio"/> YES <input type="radio"/> NO

If the answer to any of the above questions is "YES",

STOP HERE

Do not complete the rest of the questions. The individual is the district's employee and must be paid and reported accordingly.

If all the above are "**NO**", continue....

INDEPENDENT CONTRACTOR OR EMPLOYEE? DISTRICT GUIDELINES

Part II

8.	Must the required services be performed by this individual? <i>Consider whether or not the individual may designate someone else to do the work without the district's knowledge or approval.</i>	<input type="radio"/> YES <input type="radio"/> NO
9.	Does the district have a continuing relationship with this individual? <i>Is this a "one shot deal" or will the district continue to use this individual in the future? This could be on infrequent or irregular basis but a continuous relationship exists.</i>	<input type="radio"/> YES <input type="radio"/> NO
10.	Can this relationship be terminated without the consent of <u>both</u> parties?	<input type="radio"/> YES <input type="radio"/> NO

If the answer to question 8, 9, or 10 is "**YES**", there is a good possibility that an employment relationship exists. Questions 8 & 9 are indicators of district control that, in conjunction with other factors, imply an employment relationship. Go back to PART I and re-evaluate each question. If questions 1-7 are still all "**NO**", continue....

11.	Does the individual operate an <u>independent</u> trade or business that is available to the general public? <i>A determining factor in judging independence is the performance of services to the general public. In evaluating this criteria, school districts are considered to be separate entities. Keep in mind: if the district is utilizing this individual's services on a full-time basis, the individual is <u>not</u> available to the general public. NOTE: Possession of a business license or incorporation does <u>not</u> automatically satisfy the requirement. The determination <u>must</u> be made on the actual <u>relationship</u> between the district and the individual performing services.</i>	<input type="radio"/> YES <input type="radio"/> NO
12.	Does the individual have a substantial investment in his/her business, i.e. maintains a facility, equipment, etc.? <i>This is indicative of economic risk inherent in business enterprises. An independent contractor must be able to make a profit or sustain a loss.</i>	<input type="radio"/> YES <input type="radio"/> NO

If either 11 or 12 are "**NO**",

STOP HERE

The individual is a district employee and must be paid and reported accordingly.

If 11 and 12 are both "**YES**", continue....

INDEPENDENT CONTRACTOR OR EMPLOYEE? DISTRICT GUIDELINES

Part II - continued

13.	<p>Does the individual provide all materials and support services necessary for the performance of this service?</p> <p><i>The district should not be providing office space, clerical, secretarial, or any other support for this individual such as materials, photocopying, printing, office supplies, etc.. Any necessary assistants would be hired by the individual.</i></p>	<input type="radio"/> YES <input type="radio"/> NO
14.	<p>Is this paid by the job or on a commission?</p>	<input type="radio"/> YES <input type="radio"/> NO
15.	<p>Does the individual bear the cost of any travel and business expenses incurred to perform this service?</p> <p><i>Generally, these types of expenses are paid by an employer, however, some contracts provide for payment of air fare, mileage, etc. for consultants.</i></p>	<input type="radio"/> YES <input type="radio"/> NO

If 11 and 12 are "**YES**", 13 through 15 should also be "**YES**", and are items that should be written into the consultant contract. This individual is an independent contractor. A "**YES**", on questions 13 through 15, supports the district's conclusion and substantiates a "reasonable basis" for treatment as an independent contractor. While there are circumstances where the district might pay contractually provided expenses, these should be kept at a minimum to avoid giving the impression of an employment relationship.

Signature of Individual Completing Questionnaire

Title

Date