



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
CHIEF COUNSEL

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COR-131104-00
September 5, 2001



Key

State = [redacted]
[redacted]

This is in response to your letter to [redacted], dated September 5, 2000, concerning the employment status of school administrators and teachers. We are sorry that we cannot provide you with a formal ruling. Private letter rulings are governed by the procedures outlined in Rev. Proc. 2001-1, 2001-1 I.R.B. 1, January 2, 2001. In questions of worker classification, the IRS offers the SS-8 procedure, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. Requests regarding employment status from taxpayers other than federal agencies and instrumentalities should be submitted to the appropriate IRS office listed on the current Form SS-8. Rev. Proc. 2001-1, sec. 5.09. We can, however, provide you with the following general information, which we hope will be helpful to you.

You have informed us that State statute provides that a school board may select and employ a qualified person as chief school administrator for a school district, i.e. school superintendent. The statutes were amended to state that the term "employ" includes "employment by contract."

You state that this provision has been interpreted to mean that a chief school administrator may be treated as an independent contractor. School districts are obtaining the services of school superintendents through either an incorporated or an unincorporated business established by the superintendent. You state that retired teachers are also being hired by some of these businesses and furnished to school districts as contract workers.

COR-131104-00

The businesses presumably treat the teachers as their employees. You have inquired whether this interpretation is consistent with federal law concerning employment status.¹

Section 3402(a) of the Internal Revenue Code (the Code) provides that every employer making payment of wages shall deduct and withhold federal income taxes.

Code section 3401(c) provides that, for purposes of this chapter, the term "employee" includes an officer, employee, or elected official of a state, or any political subdivision thereof. Section 3401(c) applies only for income tax withholding purposes.

For purposes of taxes under the Federal Insurance Contributions Act (FICA), employee status is determined under the common law. Code section 3121(d)(2). An individual is an employee if, under the common law rules, the relationship between the individual and the person for whom he or she performs services is the legal relationship of employer and employee. Generally this relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished but also as to the details and means by which the result is accomplished. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. Section 31.3121(d)-1(c), Employment Tax Regulations.

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COR-131104-00

In applying the common-law rules, the IRS considers three types of evidence, the service recipient's degree of behavioral and financial control over the worker and the relationship between the parties, including evidence of how they view their relationship.

The fact that an individual is employed part-time, or works for more than one employer, is not evidence of independent contractor status. A part-time worker may be an employee under the common-law rules.

I. Behavioral Control

Behavioral control is evidenced by facts which indicate whether the service recipient has a right to direct and control how the worker performs the tasks for which he or she is hired. Facts which illustrate the right to control how a worker performs a task include the provision of training and evaluation and the existence of employee manuals or policies indicating intent to control the performance of the employee. The presence of a chain of command is indicative of a right to control, as is the requirement of an oath of office.

When the service recipient is a government entity and the position is created by a constitution or statute, we look at the law establishing the position and its duties to determine whether there is a right to control the worker typical of the employer-employee relationship.

A. School Superintendents

Under State law, the position of school superintendent and its duties are established by statute. The school superintendent is required to administer the district in accordance with policies the school board prescribes by bylaw. The school superintendent is required to select, appoint and control all school district employees, subject to the approval of the school board.

State has an educational system under which there is a State Department of Education (Department) and a State Board of Education (Board), which supervise the local boards. The Department prescribes by regulation a minimum course of study, develops performance standards to be met by students at designated age levels, and by regulation establishes safety standards for schools, among many other areas of responsibility.²

COR-131104-00

Local school boards are composed of elected officials whose duty it is to establish school policies and supervise their implementation. They are required to express their policies for management and control of the district in written bylaws formally adopted.³

School districts are required to adopt educational goals and policies and are evaluated as to their success or failure in achieving the goals. School boards control school budgets, determine compensation of all school employees and administrative officers, hold meetings, keep records, etc.⁴ School boards are required to adopt written bylaws expressing policies relating to management and control of the school district.⁵ The State Supreme Court has affirmed that a school board has a duty to control the administrative practices of its school superintendent.⁶

As an illustration of facts typical of right to control, State has adopted a statute concerning school accountability. If a school is rated deficient, it must prepare an improvement plan with participation of parents, teachers and community groups. The Department monitors progress, and, if a school continues to be deficient for two years, the chief school administrator, the president of the governing body and the principal must present a written report on the performance of the school. The Board is required to promulgate regulations to assist public schools in the improvement of performance.⁷

B. Teachers

State statutes governing employment and tenure provide for the issuance of contracts to employees regularly qualified under the regulations of the department. These employees include the school superintendent.⁸ In another provision, the term "employer" is defined to include a superintendent who appoints a teacher.⁹

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

COR-131104-00

The same provision establishes tenure rights for teachers, but not for superintendents.¹⁰ A teacher who has acquired tenure has the right to employment by the school district during continuous employment, with certain exceptions.¹¹ School boards and the Department have authority to adopt teacher tenure bylaws not in conflict with the regulations of the Department or State law.¹²

State statutes require school boards to adopt a system of evaluating teachers and administrators, with the exception of the superintendent. School districts are required to perform an annual evaluation of teachers and administrators and prepare a plan of improvement for any teacher or administrator who did not meet performance standards.¹³

State statutes contain provisions governing professional teaching practices. They establish qualifications for teachers and establish a commission on professional standards and practices.

State provides employee benefits to teachers and administrators, including a teachers' retirement system.¹⁴

II. Financial Control

Financial control is evidenced by facts which indicate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. A service recipient has more economic control over an employee than over an independent contractor. Furthermore, an independent contractor has a genuine possibility of profit or loss beyond that of an employee, who receives a salary as long as he works.

Facts indicative of a genuine possibility of profit or loss are expenditures for equipment and facilities and fixed costs incurred regardless of whether the individual works, offering one's services to the public, maintaining an office, and hiring staff and employees. Typical of an independent contractor relationship are working by the day or by the job and incurring substantial unreimbursed business expenses.

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COR-131104-00

III. Relationship of the Parties

The relationship of the parties is generally determined by examining the parties' agreements and actions with respect to each other, paying close attention to those facts which show not only how they perceive their relationship but also how they represent their relationship to others. Facts which illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of, employee benefits; the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities. The right of the parties to terminate the relationship without penalty to either is typical of an employer-employee relationship.

It is important to consider the relationship of the parties, including any written contract in which the parties state the type of relationship they intended to create. If the relationship of employer and employee exists, however, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, independent contractor or the like. Section 31.3121(d)-1(a)(3), Employment Tax Regulations.

Other indications of an employee relationship are issuance of Forms W-2, provision of employee benefits such as health, life, and professional liability insurance, participation in qualified retirement plans, and reimbursement for business expenses.

As this letter is not a ruling, it presents only general rules of law and does not apply the law to specific facts. I hope this general information will be helpful to you. If you have any further questions, please call Elizabeth Edwards of this office at (202) 622-6040.

Sincerely,

Jerry E. Holmes
Branch Chief
CC:TE/GE:EOEG:ET2