

“1099 Employees” And Other Mythological Creatures - Demystifying the Independent Contractor Test in the Public Education Context

SCASBO

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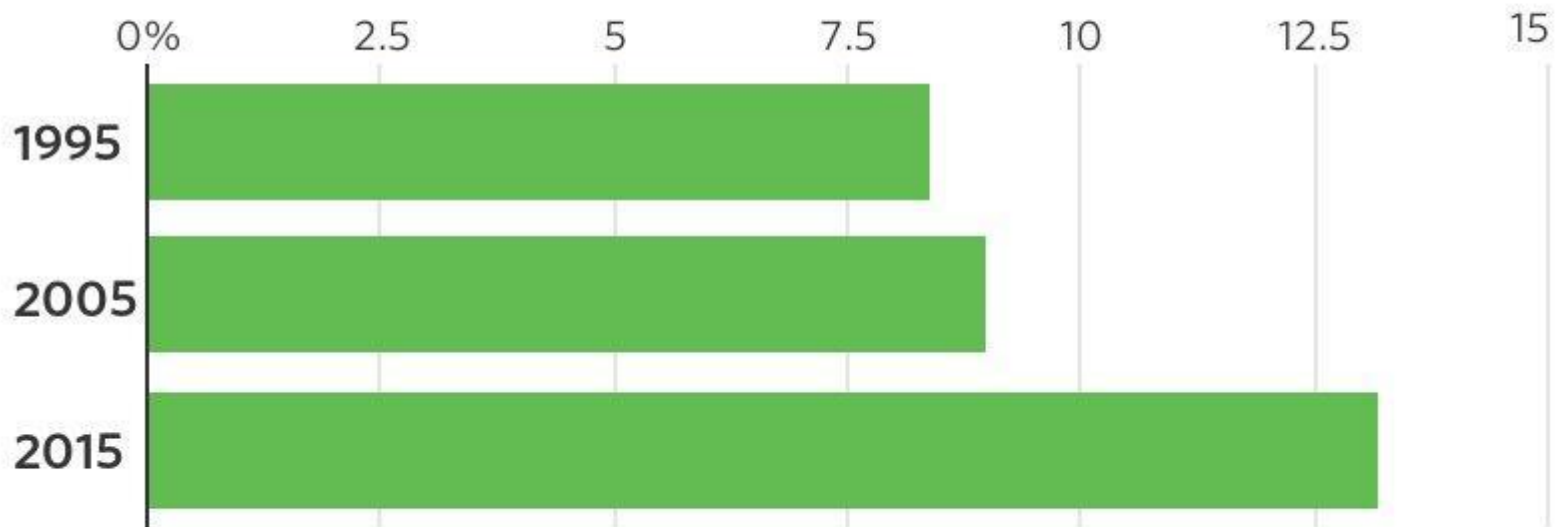


SCOPE OF PRESENTATION



- Proper classification of employees vs. independent contractors
- Joint employment issues with outsourcing
- Legal issues arising from misclassification and joint employment
- “Fun” hypothetical exercises
- Quick FLSA update

Estimated percentage of the U.S. workforce that are contract-firm workers, temporary help agency workers or independent contractors



Source: Lawrence Katz (Harvard University) and Alan Krueger (Princeton University)

EMPLOYEE VS. INDEPENDENT CONTRACTOR – WHO'S WATCHING?



- ❖ IRS
- ❖ U.S. Department of Labor
- ❖ EEOC/SC Human Affairs Commission
- ❖ PEBA/State Agencies
- ❖ Courts



Form **SS-8**

(Rev. May 2014)

Department of the Treasury
Internal Revenue Service**Determination of Worker Status for Purposes
of Federal Employment Taxes and
Income Tax Withholding**▶ Information about Form SS-8 and its separate instructions is at www.irs.gov/formss8.

OMB. No. 1545-0004

For IRS Use Only:
Case Number:

Earliest Receipt Date:

| | | | |
|---|---------------------------------------|---|--|
| Name of firm (or person) for whom the worker performed services | | Worker's name | |
| Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code) | | Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code) | |
| Trade name | Firm's e-mail address | Worker's daytime telephone number | Worker's e-mail address |
| Firm's tax number | Firm's website | Worker's alternate telephone number | Worker's fax number |
| Firm's telephone number (include area code) | Firm's employer identification number | Worker's social security number | Worker's employer identification number (if any) |

Note. If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer. ▶ _____

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* in the separate instructions for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I-V. All filers of Form SS-8 must complete all questions in Parts I-IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or worker's name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.

Part I General Information

- This form is being completed by: Firm Worker; for services performed _____ to _____.
(beginning date) (ending date)
- Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get workers' compensation benefits, or you were audited or are being audited by the IRS). _____

- Total number of workers who performed or are performing the same or similar services: _____
- How did the worker obtain the job? Application Bid Employment Agency Other (specify) _____
- Attach copies of all supporting documentation (for example, contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements or IRS rulings). In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue \$ _____.
If both Form W-2 and Form 1099-MISC were issued or received, explain why. _____
- Describe the firm's business. _____

IRS Factor Tests

Behavioral Control

Type of Relationship

Financial Control



BEHAVIORAL CONTROL

- Employer does not direct and control how IC completes work
- When, where, how, such as:
 - When and where to work
 - Tools or equipment to use
 - Who can assist with the work
 - Where to purchase supplies, services, assistance
 - Who performs the actual work
 - Order or sequence of work
- IC usually does not require training to complete work

FINANCIAL CONTROL

- No expense reimbursement
- IC has significant investment in facilities, tools, methods to complete work
- IC makes services available to others with business location, advertising, etc.
- IC normally not guaranteed a regular wage for hourly, weekly, other time

TYPE OF RELATIONSHIP

- IC normally has written contract
- IC does not receive benefits such as insurance, retirement contribution, vacation, sick leave
- IC has finite relationship duration
- IC's services not core function of employer's business

US DEPARTMENT OF LABOR – ECONOMIC REALITIES TEST

- Work performed is not integral part of employer's business
- Worker's opportunity for profit depends upon skill and efficiency
- Worker's investment in performing work is significant compared to employer
- Work performed requires special skill and initiative
- Work relationship not permanent nor indefinite
- Employer's control over employee is limited in nature and degree

Top 10 Reasons You Might be an Employee, Rather Than an Independent Contractor

1. You don't submit a weekly or monthly invoice for your services.
2. The guy you work for refers to himself as your boss.
3. You have a specific schedule, are monitored by someone and are told when to take your lunch break.
4. Other workers doing exact same job are classified as W2 employees.
5. The company gives you a uniform and you are required to wear it.
6. You have company business cards and a company email address.
7. The company tells you when you can take vacation.
8. You are using a computer provided by the company.
9. The IRS calls and says "We need to talk."
10. You're too drunk to fish.

POTENTIAL INDEPENDENT CONTRACTORS IN SCHOOL DISTRICTS

- Occupational and Physical Therapists
- Speech Therapists
- Orientation and Mobility Specialists
- Psychologists
- Evaluators/consultants
- Not teachers, administrators, retired employees in same job

**EMPLOYEES MUST WASH HANDS
BEFORE RETURNING TO WORK**



**I'M AN INDEPENDENT
CONTRACTOR**

JOINT EMPLOYER RELATIONSHIP FACTORS

1. Whether employers jointly determine, share, or allocate power:
 - a) to direct, control, or supervise the worker
 - b) to modify the terms or conditions of the worker's employment, including hiring/firing
2. The degree of permanency and duration of the relationship between the employers
3. Whether one employer controls, or is under common control with the other
4. Whether the work is performed on a premises owned or controlled by one of the employers

JOINT EMPLOYER RELATIONSHIP FACTORS (cont'd.)

5. Whether the employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employee:
 - Payroll
 - Payroll taxes
 - Worker's compensation
 - Equipment, facilities, tools, materials provided for work

JOINT EMPLOYMENT IN SCHOOLS

School districts are likely joint employers over many contracted employees

- Substitute teachers
- Food service
- Custodial
- After school

Liability can/should be addressed in contract with provider

EMPLOYEE OR IC?

Polly Psychologist is a retired employee of District X. After a year drinking margaritas at the beach, she was bored and has returned to the upstate to perform evaluation and testing on an as-needed basis for District X, as well as for Districts T and Y. She is working by herself and is not incorporated. District Z is considering contracting with Polly to evaluate 10-15 students. Polly will be paid \$300 per evaluation and can schedule and complete the evaluations on her own time as long as they are finished by May 31. She will not be assigned an office or report to a supervisor, although she will complete the evaluations at 3 elementary schools in District Z.

EMPLOYEE OR IC?

Suburban school district notes that a growing number of its high school students are wearing polo shirts with their collars popped up and decides that it obviously needs to start a lacrosse program. Biff, a local financial planner who recently moved from the D.C. area, played lacrosse at Johns Hopkins and Andy Athletic Director believes he would make a good coach. Andy knows nothing about lacrosse and doesn't intend to tell Biff how to coach the team.

1. Can school district treat Biff as an independent contractor?
2. Can Biff be treated as a volunteer?
3. Is Biff otherwise exempt from overtime if he puts in more than 40 hours a week coaching LAX, bro?

JOINT EMPLOYMENT

School district contracts with reputable temp agency to provide substitute teachers, and Stan substitute frequently works at Local Geographic Landmark Elementary School. Carla custodian works for a contracted service that cleans the school. Stan has been making unwelcome sexual advances toward Carla that have not been directly reported to school administrators but have been observed by teachers and others. Carla files a charge of discrimination against both the temp agency and the school district. Who's on the hook?

QUICK FLSA UPDATE

No recent activity on regulations raising required salary for exempt status

- Still \$455/week

DOL has announced plan to raise it, but not as much as 2016 proposal. Also:

- Clarification of “joint employment”
- Clarification of “regular rate”

Supreme Court issues employer-friendly decision on exemptions

QUESTIONS?

