


**Independent Contractors and School Districts**



Presented by:  
**Eric G. Rodriguez**  
Attorney at Law

© Walsh Gallegos 2020

---

---

---

---

---

---

---

---



**THE TEST**

---

---

---


---

---

---


---

---



**IRS Factors to Determine Worker Status**

- Behavioral Control
- Financial Control
- Type of Relationship
- Key Activity of Business



---

---

---

---


---

---

---


---





## Behavioral Control

- Specific Instruction – where, when, how, and in what order to do the work, which equipment and tools to use to do the work
- Degree of Instruction – specific and detailed looks like an employee
- Training Protocols and Procedures – any required training
- Evaluation – measuring how work is performed



---

---

---

---

---

---

---



## Financial Control

- Significant Investment
- Reimbursed Expenses
- Opportunity for Profit or Loss
- Services Available to the Market
- Method of Payment



---

---


---

---

---


---

---



## Type of Relationship

- Written Contracts
- Employee Benefits – contractors do not receive employee benefits
- Permanence of Relationship – indefinite or short defined term
- Services Relative to Activity of Business
- Characterization of Similar Relationships or past relationship with District



---

---

---


---

---

---


---





## Key Activity of Business

- Recent **STRONG** emphasis on fourth factor of work that is "integral to the business of the employer"
- For schools and special education co-ops, these are often all positions that work exclusively with students
- Can include all positions that provide educational services, including most all teaching positions, tutors, homebound teachers, clinicians, consultants who work with students, and positions that have often been categorized as independent contractors in the past, such as Occupational Therapists, Physical Therapists, Speech Therapists, and Orientation and Mobility Specialists



---

---

---


---

---

---


---

---



## Additional Factors Considered by the IRS

- Did the Independent Contractor work for the district before, particularly in the current or prior school year?
- Is the Independent Contractor performing the same or similar job they performed as an employee or that current employees perform?
- Is the Independent Contractor a real "business", such as a corporation, a limited partnership, or at least a DBA with a company name and tax ID number, or is it a solo individual using an SSN?
- Does the business have a website, employees, and use its own resources and materials?



---

---

---

---

---

---

---

---





## EXAMPLES

---

---

---

---

---

---

---

---



## Hank

A school district recently hired Hank, a retired Special Education Director, retired CFO, or a retired Superintendent, on an interim basis while it searches for someone to fill the position permanently. Even though Hank was hired on an interim basis, he is providing a "key activity" to the district. The district ultimately has the right to control how Hank's job is done, whether or not it exercises that right. Furthermore, individuals in these positions are almost always characterized as employees. Is Hank (in any of these positions) an employee or an Independent Contractor?

WG

---

---

---

---

---

---

---

## Susan

Susan is a licensed professional orientation and mobility specialist, who works with seven students each week. She provides her availability and coordinates her schedule with the students at school to schedule her hourly sessions. She has a website, carries a general liability policy, works for four other school districts, and she uses her own materials and protocols. She must, however, comply with state/federal law, as well as local policies and the students' IEPs.

WG

---

---

---

---

---

---

---

## Susan Continued...

Notwithstanding state/federal law and local policy requirements, she determines her own methods during each of her sessions with the students to attempt to achieve the goals outlined in the IEPs, and in fact, many of her sessions take place off campus. She bills the school district by the hour, at her hourly rate, and does NOT charge the school district reimbursement for her mileage. She keeps a log of the time she spends with each student, and she provides summaries of each of her sessions to the school district. Does she sound like an employee or an Independent Contractor?

WG

---

---

---

---

---

---

---



## But What If Susan ...

Unfortunately, upon further examination, you discover that Susan previously worked for the school district as an employee in the exact same capacity she is currently working as an independent contractor. In fact, she retired last school year and received a W-2 for the 2017-2018 school year but will receive a 1099 for the 2018-2019 school year. This will result in her receiving a W-2 and a 1099 in the same calendar year. Does this change the analysis?

WG

---

---

---

---

---

---

---

## Felicia

Felicia is hired by the district as a tutor. The district tells Felicia when to arrive, what subjects to teach, which students to tutor, and what results it expects. The district does not train Felicia, but it could provide training if necessary. The district has the right to control Felicia's behavior. The district may, however, lack the right to control the financial aspect of the job. Felicia advertises her tutoring services, and she intends on tutoring other clients while she tutors for the district.

WG

---

---

---

---

---

---

---

## Lisa

Lisa teaches English at the middle school and receives a W-2 as a district employee. She also loves sports and attends all the home games. The district recently hired her to work softball games as the scorekeeper and announcer. The district plans to treat Lisa as an independent contractor and issue a Form-1099 for her work at the games. Right or wrong?

WG

---

---

---


---

---

---


---





### Additional Examples

- The district hires clinicians to teach the band, choir, or drill team routines during the summer and/or the school year. These are typically individuals who are skilled but work directly with students. Temporary employee or Independent Contractor?
- A different district contracts with companies to do this same work, but the companies are incorporated, have multiple employees, and assign an employee to come and deliver the clinic. Different answer?
- A district contracts with individuals to do professional development for staff members in areas of the individuals' special expertise. They use their own materials that they have created. What are they?



---

---

---

---

---

---

---

---



### AN IRS AUDIT



---

---

---


---

---

---


---

---



### Process for IRS Audit

- Notice – you must read these carefully and meet all deadlines.
- Document Review – documents will be requested in multiple requests. You must provide copies of ALL requested documents.
- Interviews and On-Site Visit – the IRS will almost certainly come visit to review certain documents and possibly conduct interviews. You must be prepared.



---

---

---

---

---

---

---

---



## Process for IRS Audit – cont.

- Response from IRS with Recommendation. These should be considered carefully and you should consider seeking advice on how you might be able to negotiate.
- Possible Negotiation or Submission from District. You may sometimes agree to reclassify positions in order to limit penalties and future consequences. You may also be able to negotiate some fines.
- Final Report from IRS with Determinations. You must sign and return this in order to end the audit.

[illegible]

## A TRS AUDIT


[illegible]

## Process for TRS Audit

- TRS has started doing audits in the last few years.
- Audits will focus on retirees being used as Independent Contractors, as well as other reporting issues.
- Due to a TAC rule, TRS considers any individual who is performing the same work for a district within the first 12 months after retirement that they previously performed as an employee to be an employee and NOT an Independent Contractor.


[illegible]





## Process for TRS Audit – cont.

- If TRS finds that a district has incorrectly classified a retiree as an independent contractor rather than an employee, they will charge the district retroactive retire-rehire surcharges and will make the retiree pay benefits back to TRS.
- There is an opportunity for response and argument during a TRS audit – this is worth trying.



---

---

---

---

---

---

---

---





## CONVERTING INDEPENDENT CONTRACTORS TO EMPLOYEES

---

---

---

---

---

---

---

---



## Employment Issues for Consideration

- Employment arrangements
- Compensation issues
- TRS eligibility
- TRS benefits/surcharges
- Health insurance eligibility
- State personal leave
- Unemployment compensation claims



---

---

---

---

---

---

---

---



- IRS website available to the public at [www.irs.gov](http://www.irs.gov)
- Division of the IRS - Federal, State and Local Governments (FSLG) to ensure governmental entities comply with federal employment tax laws
- FSLG agents work with other groups, like TASBO, to help school districts comply with federal tax laws
- FSLG has many great resources online at <http://www.irs.gov/govt/fslg/index.html>



[erodriguez@wabsa.com](mailto:erodriguez@wabsa.com)  
[www.walshgallegos.com](http://www.walshgallegos.com)

[illegible]