

**APPENDIX D**

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**THE 20 COMMON LAW FACTORS  
USED TO DETERMINE WHETHER A WORKER IS AN  
EMPLOYEE OR INDEPENDENT CONTRACTOR**

1. **Instructions** - Employees must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employee has the right to control how the work results are achieved.
2. **Training** - Employees may be trained to work in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.
3. **Integration** - Employees' services are usually integrated into the business operations, because they are important to the success or continuation of the business. This shows that employees are subject to direction and control.
4. **Services rendered personally** - Employees render services personally. This shows that the employer is interested in the methods as well as the results.
5. **Hiring assistants** - Employees work for an employer who hires, supervises, and pays workers. Independent contractors can hire, supervise, and pay assistants under a contract that requires them to provide materials and labor and to be responsible only for the result.
6. **Continuing relationship** - Employees generally have a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals.
7. **Set hours of work** - Employees usually have set hours of work established by an employer. Independent contractors generally can set their own work hours.
8. **Full-time required** - Employees may be required to work or be available full-time. This indicates control by the employer. Independent contractors can work when and for whom they choose.
9. **Work done on premises** - Employees usually work on the employer's premises, or a route or at a location designated by an employer.
10. **Order or sequence set** - Employees may be required to work in the order or sequence set by an employer. This shows that they are subject to direction and control.
11. **Reports** - Employees may be required to submit reports to an employer. This shows that the employer maintains a degree of control.
12. **Payments** - Employees are generally paid by the hour, week, or month. Independent contractors are usually paid by the job or on a straight commission.
13. **Expenses** - Employees' business and travel expenses are generally paid by an employer. This shows that they are subject to regulation and control.
14. **Tools and materials** - Employees are normally furnished significant tools, materials, and other equipment by an employer.

15. **Investment** - Independent contractors have a significant investment in the facilities they use in working for someone else.
16. **Profit or loss** - Independent contractors can make profits or suffer losses.
17. **Works for more than one person or firm** - Independent contractors are generally free to provide their services to two or more unrelated persons or firms at the same time.
18. **Offers services to the general public** - Independent contractors make their services available to the general public.
19. **Right to fire** - Employees can be fired by an employer. Independent contractors can't be fired, so long as they produce a result that meets the specifications of the contract.
20. **Right to quit** - Employees can quit their jobs at any time without incurring liability. Independent contractors usually agree to complete a specific job and are responsible for its satisfactory completion, or they are legally obligated to make good for failure to complete a job.

## **FACTORS THAT SUGGEST EMPLOYEE STATUS**

- **Instructions by firm**
- **Firm trains worker**
- **Services performed** are vital to the business
- **Services must be** rendered personally by the worker
- **Continuing relationship** between workers and firm
- **Full time required**
- **Order or sequence** of task set by firm
- **Regular or written** reports by worker or firm
- **Firm pays business** or travel expenses
- **Firm provides tools**, materials, or significant equipment
- **Firm has right to discharge** worker
- **Worker has right to end** relationship with firm at any time without liability
- **Work done** on firm's premises
- **Set hours** of work



**FACTORS THAT SUGGEST  
INDEPENDENT CONTRACTOR STATUS**

- **Worker paid** on a "job-by-job" or commission basis
- **Worker invests** in facilities used by the worker to perform services
- **Worker can** realize a profit or loss based on performance of services
- **Worker provides** services to more than one firm at a time
- **Worker makes** services available to the general public
- **Worker hires**, supervises, and fires own assistants





STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

CHARLIE BROWN  
ATTORNEY GENERAL

March 3, 1986

Dr. Tom McNeel  
State Superintendent of Schools  
State Capitol Complex  
Building 6, Room 358  
Charleston, West Virginia 25305

Re: Game Officials' Status

Dear Dr. McNeel:

This letter is written in response to your inquiry regarding whether a game official (e.g., basketball referee, baseball umpire, etc.) is an employee of a county board of education or an independent contractor. In your letter, you have indicated that these athletic officials are hired for the limited purpose of specific games, that they furnish their own equipment and supplies, that they pay their own expenses, that they do not have to accept an assignment, and that the schools do not retain any supervisory power over the officiating. Whether such person is employed by the board of education in another capacity is irrelevant to the determination of whether, for purposes of officiating, they are an independent contractor.

"An independent contractor is a person employed to do a piece of work without restriction as to the means \* \* \* and [who] undertakes to do the work according to his own ideas \* \* \* and to whom the owner looks only for results." 9B M.J., Independent Contractors § 2.

Although there are a number of many-factored tests that answer this question, in West Virginia the determinative question is that of supervision or control:

"The test of the relation between one having work done and the workman consists in the employer's right or lack of right to supervise the work. If that right exists, the relation is that of master and servant. If that right does not exist, the relation is that of employer and independent contractor." Bethlehem Mines Corp. v. Haden, 153 W. Va. 721, 739, 172 S.E.2d 126 (1969); McCoy v. Cohen, 149 W. Va. 197, 210, 140 S.#.2d 427,

(1965); Spencer v. Travelers Insurance Company, 148 W. Va. 111, 133 S.E.2d 735 (1963); Davis v. Fire Creek Fuel Company, 144 W. Va. 537, 109 S.E.2d 735 (1959); Moore v. Burriss, 132 W. Va. 757, 54 S.E.2d 23 (1949); Meyn v. Dulaney-Miller Auto Co., 118 W. Va. 545, 191 S.E. 558 (1959); Greaser v. Appaline Oil Company, 109 W. Va. 396, 155 S.E. 170 (1930).

Without doubt, the school hiring the game referee has no right to control the official's actions. They cannot overrule foul calls, order baskets be made good, or call fouls themselves. A trip to nearly any high school sporting event would demonstrate that the school officials' attempts to supervise (manifested by a coach's walking back and forth and yelling at the referee) always fall on deaf ears. The lack of supervision and/or control compels the conclusion that game officials are in fact, independent contractors.

In your letter, you have asked us to reconsider the informal opinion of Deputy Attorney General William Carroll. The informal opinion dealt with the propriety of withholding teachers' retirement contributions, social security deductions, state income tax deductions, federal income tax deductions, and worker's compensation from remuneration payable under extracurricular assignment contracts. In those instances, a teacher is given a salary enhancement to function as a coach, choir director, cheerleader sponser, band director, etc. In those situations, control remains with the school authorities and the above-mentioned deductions are applicable. Inasmuch as this is a formal opinion of this office, it controls, and the inconsistency of the prior informal opinion as to "game officials" is hereby overruled.

Game officials are independent contractors and are not subject to employee pay deductions as mentioned above.

Very truly yours,

CHARLES G. BROWN  
ATTORNEY GENERAL

By

 Assistant  
J. BRADLEY RUSSELL

JBR/cja