

THE STATE



OF WYOMING

ED HERSCHLER
GOVERNOR

In reply refer to:

Attorney General

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TO: ALL STATE AGENCIES

FROM: Bruce A. Salzburg
Senior Assistant
Attorney General

RE: State Contracts

With the arrival of federal and state budget cuts, many questions have arisen concerning the use of independent contractors to perform services which were previously performed by state employees. Agencies faced with budget constraints have resorted to independent contractors' contracts in order to reduce the cost of such services by eliminating fringe benefit and tax costs.

Generally, this practice is not improper; however, when the duties and terms of employment of the independent contractors are identical to that of the prior employees, it is apparent that the practice is a ruse. In such a situation the State may be liable for payment of social security taxes, unemployment taxes and federal tax withholding.

For your guidance in determining whether independent contracts are appropriate, we offer the following advice.

The existence of a contract does not make the provider an "independent contractor" under federal law. The principle element examined to determine whether a provider is an independent contractor or an employee for whom the state must withhold taxes and social security benefits is control of the provider.

The following factors indicate that the provider is an employee:

1. The establishment of the hours of work by the State. An employee works set hours. An independent contractor is hired to do a job; he generally sets his own hours.

2. Direct supervision by the State. An employee is supervised by the employer. An independent contractor is not supervised but must perform the contracted work on his own.

3. Provision of materials, supplies, office space and support services. An employee is provided with all that is necessary to perform his work. An independent contractor is paid a sum out of which he supplies himself with the means to perform the terms of the contract.

4. Periodic payment for services. An employee is paid a salary based upon some set period of time (e.g., per hour, per week, per month). An independent contractor is paid for a particular job. Generally, an independent contractor may estimate a fee by resort to computation of the time that performance will take but set the fee based on the job. This is alright; however, when the fee is determined by how long it takes to complete, the relationship may be questionable. When the use of a time card is present, or some other method of computing time for payment purposes, employee status is almost presumed.

5. Existence of other contracts. An employee generally works full time for his employer. An independent contractor may work for several different people simultaneously. If the State can prevent the provider from rendering services to others, the provider will be an employee.

6. Ability to terminate contract without liability. An employee may be fired without any claim to continued compensation. An independent contractor may sue for breach of contract and pursue any right under the contract. On the other hand, the State could terminate a contract for breach and elect to sue for damages caused by the breach or for specific performance of the contract. An employer cannot sue a terminated employee.

7. Ability to delegate or assign. An employee is hired to do a job himself. An independent contractor is hired to have a job performed. An independent contractor may hire others to perform the contract or may assign the contract completely without state oversight. Again, the State is only interested in performance of the terms, not who performs. (Certain contracts for personal services may be appropriate. For example, if the State contracts with an artist to paint a portrait, the work of that particular artist may be required without creating an employee relationship.)

8. Control of details of performance. An employee may be told precisely how to perform his duties. An independent contractor performs the terms as he sees fit.

So long as the terms are satisfactorily performed, the State cannot control the details of performance.

You have been previously provided with a lengthy document which summarizes in detail the factors considered by the IRS and Social Security Administration in determining whether a provider is an employee rather than an independent contractor. Please review those factors when drafting contracts, as well as those listed above. It is hoped that this memo provides better guidance.

Contracts submitted for approval which indicate that employee status exists will be rejected.

The Purchasing Division has a sample contract which can be used as a guide in drafting. Your assigned attorney in this office can assist you with your contracts.

BAS:llc

For questions please contact:

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cc: Supreme Court
Legislative Service Office