

FLSA ECONOMIC REALITIES TEST

This document does not constitute legal advice. If the school district has concerns in determining the appropriate business relationship with service workers it should consult with its counsel.

The US Department of Labor uses what it call an “economic realities” test to determine the nature of the working relationship. Their basis for review is to determine whether a service worker is entitled to the protections under the Fair Labor Standards Act (FLSA), including minimum wages and overtime pay. In order to have those protections, an individual must be an employee. The FLSA defines “employ” to include “suffer or permit to work”. This is a very broad definition. The basic difference, in FLSA terms, is that workers are economically dependent on the business of the employer regardless of skill level while independent contractors are workers with economic independence who are in business for themselves.

The US Supreme Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered. The basis of analysis under the economic realities test is to determine whether a worker is truly in business for himself/herself or is economically dependent on the employer.

Factors to be considered:

- The extent to which the work is performed is in an integral part of the employer’s business
 - Carpenter is probably integral to operation of construction company
 - Copier repair technician is probably not integral to a construction company
- Whether the worker’s managerial skills affect his or her opportunity for profit and loss
 - Not whether the worker possesses managerial skills but whether the worker uses managerial skills to execute how the work will be done and is performed for the school district, i.e. makes independent business decisions
- The relative investments in facilities and equipment by the worker and the employer
 - The worker’s investment is substantial and goes beyond what is needed to complete work for the district. He/she is building a business not just buying supplies to get this job done.
- The worker’s skill and initiative
 - It takes more than specialized skill to be found to be an independent contractor. The worker must also have independent business judgment and/or initiative in using those skills.
- The permanency of the worker’s relationship with the employer
 - A permanent or indefinite relationship with the school district is more likely to indicate that the worker is an employee, but a temporary employee is not automatically an independent contractor.
 - Relationship is worker’s choice, wants to, chooses to work with the school district is more likely to indicate independent contractor.
- The nature and degree of control by the employer
 - The worker works relatively free from control of the school district (or any one else) and controls his/her amount of pay, hours worked and how the work will be performed.
 - Telecommuting is not an example of being an independent contractor.
 - Control alone will not determine the nature of the relationship.
 - The worker must exercise meaningful control over meaningful aspects of the work

FLSA ECONOMIC REALITIES TEST – FACTORS TO CONSIDER

Section One

Does the worker play an integral role in the business by performing the primary type of work that the school district performs?	Yes	No
Does the worker perform a discrete job that is one part of the school district’s overall delivery of services?	Yes	No
Does the worker supervise any of the school district’s employees?	Yes	No
Does the worker work for the district on a continuous basis?	Yes	No
Does the school district supply the worker with tools to complete his/her work?	Yes	No
Does the school district reimburse the worker for supplies and materials used?	Yes	No
Does the school district determine when the worker will work (set a schedule)?	Yes	No
Does the school district set the pay rate for the worker?	Yes	No
Does the school district prohibit the worker from working for others while working for the district?	Yes	No
Will the worker perform routine tasks requiring little training as a substantial portion of the job?	Yes	No
Is this the worker’s only job?	Yes	No
If the worker chooses not to work with the school district, will he/she still have a business?	Yes	No

Section Two

Does the worker have liability insurance?	Yes	No
Does the worker have worker’s compensation insurance?	Yes	No
Does the worker have employees?	Yes	No
Does the worker have independent judgement over how to complete the job?	Yes	No
Can the worker make a profit or loss on the job to be performed?	Yes	No
Does the worker have other clients/customers?	Yes	No
Does the worker advertise his/her services?	Yes	No
Does the worker have his/her own worksite?	Yes	No
Does the worker have business cards?	Yes	No
Does the worker have a website?	Yes	No
Will the worker make independent business decisions which could result in an economic profit or loss to his/her business when determining how to complete the work he/she does for the school district?	Yes	No
Does the worker determine how, when and where he/she will perform and complete the work for the school district?	Yes	No

Answers of “yes” in section one and answers of “no” in section two are more likely to indicate that it is an employee-employer relationship. No one factor is determinative. Remember it is a totality of the circumstances test. In an audit you will have to be able to demonstrate how the school district reached its conclusions and the reasonableness of the analysis given the information known and used when making the determination.

If you are still unable to make a decision, you can call the DOL’s hotline at 1-866-487-9243.