

## **Part I Chapter 19 Employer/Employee Issues**

- A. Dual Employment.** Before entering into a contract which involves dual employment, agencies must comply with the requirements of [Management Directive 525.11](#).
- B. Contracts with Personnel Retired from Commonwealth Employment.** An annuitant may be hired on contract as an independent contractor. Unless approved by OA, contracts with Commonwealth annuitants may not be for the performance of services normally provided by employees. The face of the contract shall include a statement indicating that the contractor is a Commonwealth annuitant.
- C. Bargaining Unit Work.** To comply with contractual provisions of the Master Agreement and Memorandum of Understanding between the Commonwealth of Pennsylvania and the American Federation of State, County and Municipal Employees (AFSCME), bargaining unit work/supervisory unit work is not to be contracted except for legitimate operational reasons resulting in reasonable cost savings or improved deliveries of services, legitimate operational reasons resulting from technological changes, or where there are insufficient numbers of available, competent employees on layoff on the applicable recall list within the agency to perform the required work. If bargaining unit work/supervisory unit work is involved, the agency must notify the appropriate bargaining unit to meet and discuss the project. The union will have 10 workdays after receipt of notification to notify the Commonwealth if it desires to meet and discuss.
- D. Employer/Employee Relationship.** A Commonwealth contract must not create an employer/employee relationship.
1. The term "employer/employee relationship" means someone is hired by contract to perform services normally performed by an employee and the agency has the right to control the individual's work in much the same manner as it does its employees. When an individual is placed on a contract rather than on the payroll and it is later determined by the federal government the individual was in fact an employee, the Commonwealth is subject to retroactive payment of certain taxes. The question of whether a contract will create an employer/employee relationship generally involves contracts with individuals. However, when a firm is used to circumvent employer/employee relationship determination criteria, a determination of employer/employee relationship is appropriate. For example, if an agency contracts with an employment agency but controls who the employment agency places on its payroll to perform the work for the agency, the employment agency cannot be considered an independent contractor and an employer/employee relationship shall exist.
  2. There are no definitive rules for characterizing particular services as those which establish an employer/employee relationship. The fact that an individual has a federal I.D. Number is not in itself an indication the individual is an independent contractor. The nature of the work and the amount of control that is or may be exercised over the individual determines whether the individual's status is that of an independent contractor or an employee.

3. The main factors and guides to be used are discussed in the following paragraphs and are those used by the federal government. These are general guides intended to aid in reaching a conclusion. The weight to be given these factors is not always constant. Their degree of importance may vary somewhat depending on the services being considered. Some of them do not apply to particular services. Any single fact or small group of facts is not conclusive evidence of the presence or absence of an employer/employee relationship. All facts should be weighted and it is the combination of these facts which points to an employer/employee relationship or an independent contractor's status. Judgment and discretion must be used in applying these guides.
4. **Nature of the Work.** An individual who provides services for which there is a Commonwealth personnel classification is ordinarily an employee. The fact that the individual is to receive a higher rate of compensation than employees performing similar services is not a valid reason for designating the individual an independent contractor. An individual who is responsible for a function of government and is to exercise judgment and discretion on behalf of the Commonwealth is, with little doubt, an employee. In some instances, an individual may appear to be an employee but because the individual possesses specialized knowledge unavailable to the agency and needed on a short term basis, the individual is actually an independent contractor.
5. **Common Law Control Test.** An individual is an employee under the common law control test when subject to control by the person for whom he or she works, where he or she works, and how he or she works. The control need not be actually exercised for an employer/employee relationship to exist – the right to exert such control is enough.

The following are factors of control:

- a. **Actual Instruction or Direction of Individual.** An individual who is required to comply with instructions about when, where, and how to work is ordinarily an employee. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct. The instructions may be in the form of manuals or written procedures which show how the desired result is to be accomplished.
- b. **Training.** Training of an individual by an experienced employee working with him or her, by meetings, or by other methods is a factor of control because it is an indication the employer wants the service performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent contractor uses his or her own methods and receives no training from the purchaser of services. In fact, it is usually the methods of the independent contractor which bring him or her to the attention of the purchaser.
- c. **Integration.** The individual whose services are in the programs or administration of the employing agency is usually subject to direction and control. In determining whether integration exists, it is necessary

to determine the scope and function of the activity and then to determine whether the services of the individual are merged into it. When the success or continuation of an activity or program depends to an appreciable degree upon the performance of certain kinds of services, the people who perform those services must necessarily be subject to a certain amount of control by the agency.

- d. **Services to be Rendered Personally.** If the individual is required to do the work personally, there is an element of control because there is an indication the employer is interested not only in getting a desired result but also in who does the job. Lack of control may be indicated when the individual has the right to hire a substitute without permission or knowledge of the employer.
- e. **Hiring and Supervising Assistants.** When the employer hires, supervises, and pays other workmen on the same job as the individual, he or she usually exercises control over all the people on the job. Sometimes it is the individual who hires, supervises, and pays the other workmen. The individual may do so as the result of a contract to provide materials and labor and under which he or she is responsible only for the attainment of a result as an independent contractor. On the other hand, if hiring, supervising, or paying of other workmen is done at the direction of the employer, the individual may be acting as an employee in the capacity of a foreman for or representative of the employer.
- f. **Duration of Relationship.** An individual who has a continuing relationship with the person for whom he or she works is more likely to be an employee than one who is engaged for a single job or for sporadic or infrequent jobs. Continuing services may be inferred if the work is performed at frequently recurring though somewhat irregular intervals, either on call of the employer or whenever the work is available. If the arrangement contemplates continuing or recurring work, the relationship is considered permanent even if the services are rendered on a part-time basis, are seasonal in nature, or the individual actually works only a short period of time.
- g. **Hours of Work.** The individual whose hours of work are set by the employer is usually an employee. The condition bars the individual from being master of his or her own time, which is a right of the independent contractor. When, because of the nature of the occupation, fixed hours are not practical, a requirement that the individual work at certain times is an element of control.
- h. **Full-time Work.** An individual required to devote full time to the business of the employer is a control factor. It gives the employer control over the amount of time the individual spends working and impliedly restricts him or her from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.
  - (1) Full-time does not necessarily mean a 7 1/2 hour day or a five-or-six-day week. Its meaning may vary with the intent of the

parties, the nature of the occupation, and customs in the locality. These conditions should be considered in defining "full-time."

- (2) Full-time service may be required even though not specified in writing or orally. For example, an individual may be required to produce a minimum volume of business.

**i. Place of Work.**

- (1) The fact that an individual does the work on an employer's premises is not control in itself; however, it does imply the employer has control especially where the work is of such a nature that it could be done elsewhere. An individual working in the employer's place of business is physically within the employer's direction and supervision. The use of desk space and of telephone and stenographic services provided by an employer places the individual within the employer's direction and supervision unless the individual has the option as to whether he or she wants to use these facilities.
- (2) The fact that work is done off the premises does indicate some freedom from control. However, it does not by itself mean the individual is not an employee. In some occupations, the services are necessarily performed away from the premises of the employer.

**j. Order of Services.**

- (1) An individual required to perform services in the order of frequency set by the employer is a factor of control because it shows the individual is not free to follow his or her own pattern of work, but must follow the established routines and schedules of the employer.
- (2) Often, because of the nature of an occupation, the employer does not set the order of the services or sets them infrequently. It is sufficient to show control; however, if the employer retains the right to do so. The outside commission salesman, for example, usually is permitted great latitude in mapping out his activities and may work "on his own" to a considerable degree. In many cases, however, at the direction of the employer, he must report to the office at specified times, follow-up on leads, and perform certain tasks at certain times. Such directions interfere with the take preference over the salesman's own routines or plans, thus indicating control.

- k. Reports.** A requirement that regular oral or written reports be submitted to the employer is an element of control. It shows the individual is compelled to account for his or her actions. Such reports are of use to the employer for present controls or future supervision; that is, they enable the employer to determine whether instructions should be issued.

**I. Manner of Payment.**

- (1) Payment by the hour, week, or month generally points to an employer/employee relationship, provided this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of doing a job. The payment by an agency of regular amounts at stated intervals to a worker is a strong indication that an employer/employee relationship is present. The firm assumes the hazard that the services of the worker will be in proportion to the regular payments, thus warranting the assumption that, in order to protect its investment, the agency has the right to direct and control the performance of the worker's services. It is also assumed, in absence of evidence to the contrary, the worker, in consideration of the payment of his or her remuneration upon such basis, has agreed the agency shall have such right of control. It is obvious the agency expects the worker to meet the standards of diligence and attention to duty necessary to justify the payments.
- (2) Generally, an individual is an employee if guaranteed a minimum salary or given a drawing account of a definite amount at stated intervals and is not required to repay any excess drawn over commissions earned.
- (3) If payment is made by the job or on a straight commission basis, it generally indicates the individual is an independent contractor. Payment by the job includes a lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Such a payment should not be confused with payment by the hour.

**m. Payment of Business Expenses.**

- (1) If the employer pays the individual's business or travel expenses, the individual is ordinarily an employee. Such an employer must be in a position to control the expenses and so has the right to regulate and direct the individual's business activities.
- (2) Conversely, an individual who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor. Being solely accountable for expenses, the individual is free to work according to his or her own methods and means.

**n. Furnishing Tools and Materials.**

- (1) The fact an employer furnishes tools, materials, etc., tends to show the existence of an employer/employee relationship. Such an employer can determine which tools the individual is to

use and, to some extent, in what order and how they shall be used.

- (2) An independent contractor ordinarily furnishes some occupations, i.e., artisans; it is the custom for workers to furnish their own tools, usually small inexpensive hand tools. Such a practice is not necessarily indicative of a lack of control over their services of the worker.
- o. Investment.** A significant investment by a person in facilities used in performing services for another tends to show an independent status on the part of the worker. Facilities include, generally, equipment or premises necessary for the work but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade.
- p. Realization of Profit or Loss.** A person who is in a position to realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances:

  - (1) The individual hires, directs and pays assistants.
  - (2) The individual has his or her own office, equipment, materials, or other facilities for doing the work.
  - (3) The individual has continuing and recurring liabilities or obligations and success or failure depends on the relation of receipts to expenditures.
  - (4) The individual agrees to perform specific jobs for prices agreed upon in advance and pays expenses incurred in connection with the work.
- q. Working for a Number of People.** The individual who works for a number of persons or firms at the same time is ordinarily not an employee. Connections with a number of firms keep an individual free from the control of any one firm. It is possible, however, that an individual may work for a number of persons or firms and still be an employee of one or all of them. For example, a bookkeeper may perform services for five firms, two hours every workday for each firm, on the firm's premises and be so controlled and directed that he or she is an employee of all them.
- r. Availability of Services to the Public.**

  - (1) The individual who makes services available to the general public is usually an independent contractor. To make services available to the public, an individual must necessarily refrain from being controlled or directed by others. An employee, on the other hand, is usually controlled and directed by the employer to such an extent that he or she is not free to sell

services to the public. The individual is not in a position to regulate working time or divide services as he or she sees fit.

- (2) An individual may hold services out to the public in number of ways. The individual may have an office and assistants, may hang out a “shingle” in front of home or office, may hold business licenses, may be listed in business directories, or may advertise in newspapers, trade journals, magazines, etc.
- s. **Right to Discharge.** The right to discharge is an important factor; it indicates that the person having this right is an employer. The individual’s employer exercises control through the ever-present threat of dismissal which causes the individual to obey instructions. An independent contractor, on the other hand, cannot be fired as long as he or she produces results which measure up to contract specifications. Sometimes an employer’s right to discharge is restricted because of a contract with a labor union. Such a restriction does not detract from the existence of any employer/employee relationship.
  - t. **Right to Quit at Any Time.** An employee has the right to end a relationship with an employer at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to make good for failure to complete the job.
6. **Final Determination.** Contracts for personal services shall not be made when an employer/employee relationship or other complement-related service will result. All requests for services in which a possible employer/employee relationship or other complement-related service could exist must be forwarded by the using agency to the Office of Administration, Office of Human Resources and Management, for review and determination. A copy of the OA approval must be attached to the referenced documents.

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**References:**

1. [Management Directive 525.11, Dual Employment](#)