

On The Alert!

Date: August 1, 2019
Attention: ASCIP Members
Affected Department(s): Administration, Human Resources,
Purchasing, Risk Management
Applicability: CCD, K-12 Districts and Charter Schools

INDEPENDENT CONTRACTOR OR EMPLOYEE?

It is becoming more challenging for school districts to maintain qualified substitute pools, provide specialized services, and secure reliable transportation methods to students. Increasingly, members are relying on innovative, cost-effective solutions to address these challenges, including outsourcing with organizations premised on the model of using independent contractors instead of employees. Before contracting for these services, districts need to understand: are substitute teachers or placed temporary hires “independent contractors” as they may be described, or are they actually employees? It makes a substantial difference in how a school district compensates these individuals, both as to wage and benefits including workers’ compensation, retirement, and others. There is also potential exposure to a district which hires a substitute as an independent contractor where a dual employer obligation may later be found to exist.

Recently, California law changed due to the Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, which held that determining whether an individual is an employee or an independent contractor is based on what is called the “ABC test”:

- (A) Is the worker free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; and
- (B) Does the worker perform work for the hirer that is outside the usual course of the hirer’s business; and
- (C) Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?



Only if the hirer (school district) can answer “yes” to all three questions can the worker be treated as an independent contractor rather than an employee. This new “ABC Test” is viewed as materially changing who is and is not able to be hired and called an independent contractor. As a result of the *Dynamex* decision, both private and public entities must review their hiring policies and practices to assure conformance with the new requirements for independent contractor status.

ASCIP recommends that members consult with their general counsel or outside counsel to determine whether you are in compliance with California law with regard to the hiring or proposed hiring of substitute teachers and placed temporary personnel.

Please contact your ASCIP’s risk services consultant at (562) 404-5642 to discuss further.