

SONOMA COUNTY OFFICE OF EDUCATION

Employee Classifications

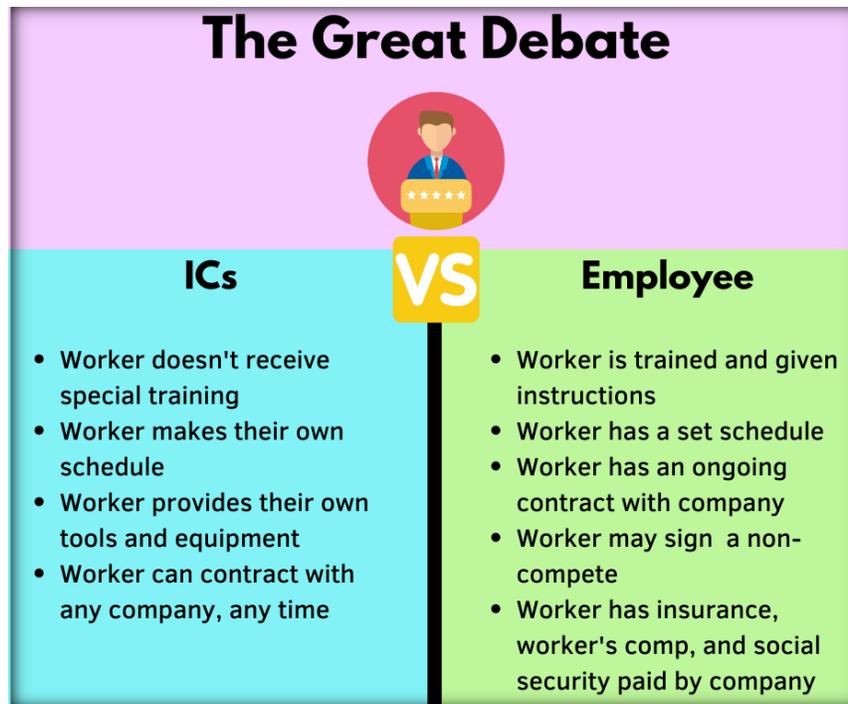
Payroll Concepts August 2021



Independent Contractor vs. Employee

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between the District and the person performing the services. Per the IRS, The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not *what* will be done and *how* it will be done. Districts should consider all evidence of the degree of control and independence in the employer/worker relationship. Whether a worker is an independent contractor or employee depends on the facts in each situation.



The IRS and State of California assume that a worker is an employee unless proven otherwise

- Education Code has defined many employee positions
 - Education Code Sections 45100-45139/88000-88040 defines what constitutes Classified service.
 - Education Code Sections 44830-44929/87400-87488 defines Certificated service positions.

IRS Independent Contractor Determination

The IRS follows the [Common Law Rules](#) for determination. To determine whether an individual is an employee or an independent contractor under the common-law, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered.

<u>Behavioral</u>	Company has control or has the right to control what the worker does and how the worker does their job
<u>Financial</u>	Are the business aspects of the worker's job controlled by the payer? (These include things like how the worker is paid, whether expenses are reimbursed, who provides the tools/supplies, etc.)
<u>Type of Relationship</u>	Are there written contracts or employee type benefits (example: pension plan, insurance, vacation pay, etc.) Will the relationship continue and is the work performed a key aspect of the business?

The IRS has [Form SS-8 – Determination of Worker Status for Purposes of Federal Employee Taxes and Income Tax Withholding](#) to help employers determine the status of their workers.

Form SS-8
(Rev. May 2014)

Department of the Treasury
Internal Revenue Service

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

OMB No. 1545-0004

For IRS Use Only:
Case Number: _____
Earliest Receipt Date: _____

► Information about Form SS-8 and its separate instructions is at www.irs.gov/formss8

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name	Firm's email address	Worker's daytime telephone number	Worker's email address
Firm's tax number	Firm's website	Worker's alternate telephone number	Worker's tax number
Firm's telephone number (include area code)	Firm's employer identification number	Worker's social security number	Worker's employer identification number (if any)

Note. If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer ► _____

IRS [Publication 15-A – Employers Supplemental Tax Guide](#) is also an excellent resource for determination guidelines.

<https://www.irs.gov/publications/p15a>

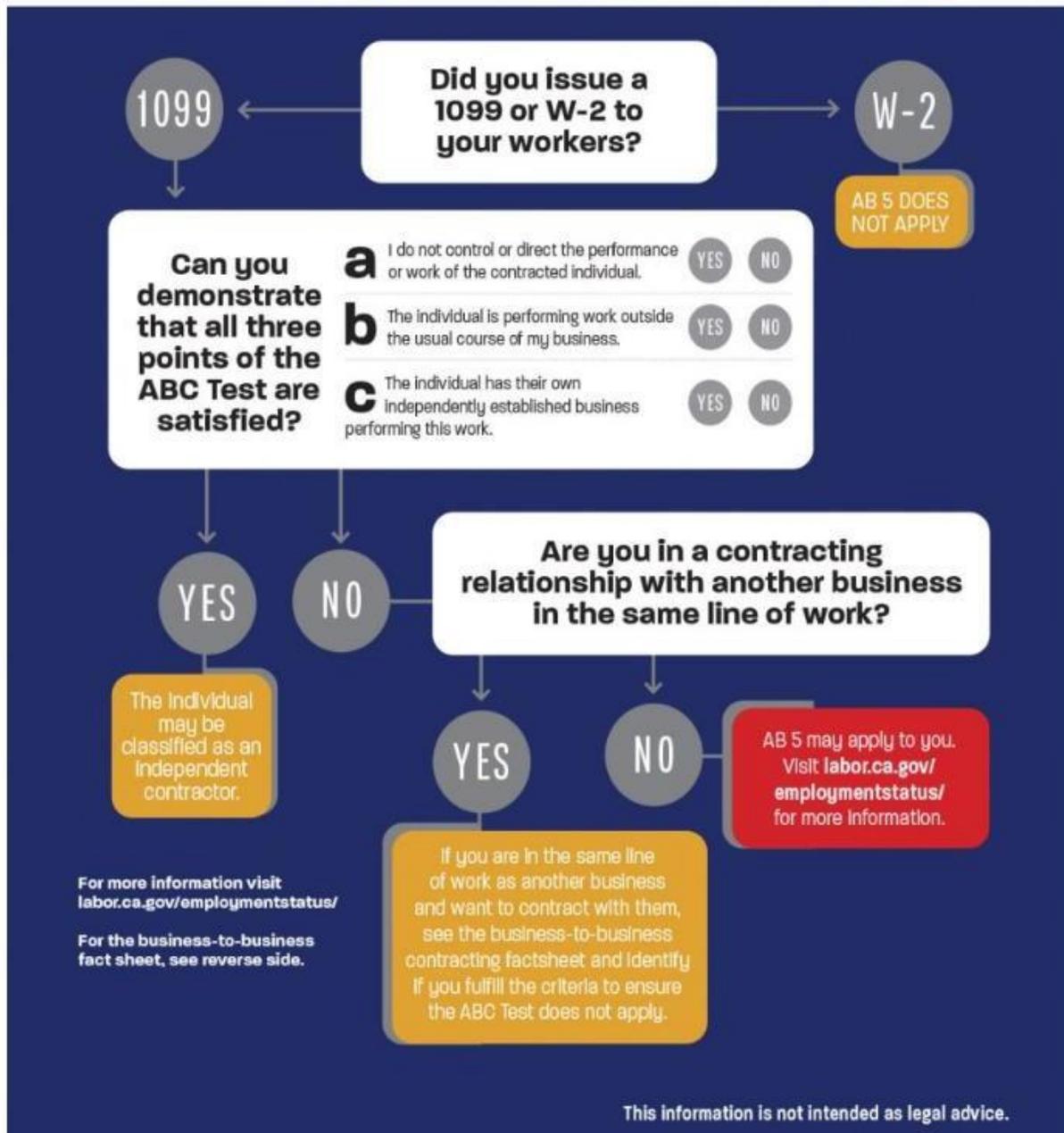
California Independent Contractor Determination

Assembly Bill (AB) 5, replaces the common law test with the ABC test to determine whether a worker is an employee or independent contractor in California. Effective January 1, 2020, hiring entities are required to **classify workers as employees unless they meet all three conditions of the ABC test.**

WHAT IS AB5? A Guide for Employers

AB 5 protects workers and law-abiding businesses in California. When working people are misclassified, they lose out on essential worker protections like paid family and sick leave, unemployment insurance, workers' compensation for job-related injuries, and protections against harassment or discrimination. AB 5 aims to stop worker misclassification that costs California taxpayers billions of dollars.

Here is how to tell if the law applies to you:



Special Consideration

Under Condition B of the ABC test for Educational entities, the hiring entity must establish that the worker performs work that is outside the usual course of its business. Any services normally provided to the public as part of the scope of the business could be considered “the usual course of business”.

Contracted workers who provide services in a role comparable to that of an existing employee will likely be viewed as working in the usual course of the hiring entity’s business.

Some problem areas for educational entities could be:

- Walk on Coaches
- Nurses
- Bus Drivers
- Language Interpreters
- Occupational Therapists
- Speech Therapists
- Licensed Professional Clinical Counselors
- School Tutors
- Outside instructors in the areas of dance, drama, art, etc.

Third Party Vendors

Be cautious when hiring worker(s) through a third-party vendor. While this seems like it simplifies the independent contractor issues, California Labor Code section 2810.3, covers businesses contracting for services with a third party, and requires that the companies contracting for labor need to ensure that the contractors they are hiring follows wage and hour laws. This could include reviewing the contractor’s pay practices.

Hiring CalSTRS and CalPERS Retirees

SPECIAL CONSIDERATIONS WHEN HIRING A RETIREE AS AN INDEPENDENT CONTRACTOR

- Retirees should NOT be hired into “Interim” positions.
- Retirees should NOT be hired into an established or existing Employee position.
- Retirees cannot be hired with 180 Days of retirement as an Independent Contractor.
- CalSTRS Retirees cannot work in a classified position except, under certain circumstances as a teacher’s aide, per Ed Code 45134.
- **CalSTRS Earnings Limitation for 2021-2022 is \$48,428** and must be

reported to STRS as per Ed Code 22461 no later than 45 days after the end of the pay period. This is done immediately upon retention of services.

- SCOE requires districts to submit the [CalSTRS Retiree Earnings Paid Through Accounts Payable](#) form whenever hiring a CalSTRS retiree and pays them through Accounts Payable (AP).

CalPERS Earnings Limitation for 2021-2022 is 960 hours per Fiscal Year

- Best Practice would be to hire them as an employee, when in doubt, to avoid possible misclassification. Make sure to hire them as a time card assignment and not in a regular position.

Retirees engaged as a true Independent Contractor are not subject to an Earnings Limitation or Hours Limitation.

Penalties for Misclassification

Federal Misclassification Penalties

- 1.5% of Wages
- 20% of worker's SS/Medicare Taxes
- \$270 per Form-No W-2 to IRS
- \$270 per Form & \$1000 fine for not furnishing employee W-2
- Interest on Past-due Deposits
- Civil & Criminal Penalties





California Misclassification Penalties

- Repayment of back payroll taxes including employee and employers shares, subject to interest and a 10% penalty on the unpaid taxes.
- Failure to withhold and pay California Payroll Taxes can also result in a fine up to \$1,000 for a misdemeanor or sentence to jail for up to one year, or both willful misclassifications range in penalties from \$5,000 to \$55,000 per instance.
- Labor Code section 226.8 provides that employers can be liable for civil penalties of \$5,000 to \$15,000 for each violation of “willful misclassification” of employees as independent contractors.
- In addition, if it is found that the employer has a pattern and practice of misclassifying independent contractors, the penalties can increase to a minimum of \$10,000 to \$25,000 per violation.



Employee Classifications

Employee Types:

1. Certificated
2. Classified
3. Board Member
4. Retiree

Certificated Employee

Ed Code 44830 (K-12) excerpt

- The governing board of a school district shall employ for positions requiring certification qualifications, only persons who possess the qualifications for those positions prescribed by law.
- It is contrary to the public policy of this state for a person or persons charged, by the governing boards, with the responsibility of recommending persons for employment by the boards to refuse or to fail to do so for reasons of race, color, religious creed, sex, or national origin of the applicants for that employment.
- The governing board of a school district shall not initially hire on a permanent, temporary, or substitute basis a certificated person seeking employment in the capacity designated in his or her credential unless that person has demonstrated basic skills proficiency.
- The governing board of a school district, with the authorization of the Commission on Teacher Credentialing, may administer the state basic skills proficiency test required under Sections 44252 and 44252.5.
- Demonstration of proficiency in reading, writing, and mathematics by a person pursuant to Section 44252 satisfies the requirements of this subdivision.

Classified Employee

Education Code 45101

- "Classification" means that each position in the classified service shall have a designated title, a regular minimum number of assigned hours per day, days per week, and months per year, a specific statement of the duties required to be performed by the employees in each such position, and the regular monthly salary ranges for each such position.

Education Code 45103

- **45103.**(a) The governing board of a school district **shall** employ persons for positions not requiring certification qualifications. The governing board of a school district shall, except where Article 6 (commencing with Section 45240) or Section 45318 applies, classify all of these employees and positions. The employees and positions shall be known as the classified service.
- (b) (1) Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be a part of the classified service.
- (2) Apprentices and professional experts employed on a temporary basis for a specific project, regardless of length of employment, shall not be a part of the classified service.
- (3) Full-time students employed part time, and part-time students employed part time in any college work-study program, or in a work experience education program conducted by a community college district pursuant to Article 7 (commencing with Section 51760) of Chapter 5 of Part 28 and that is financed by state or federal funds, shall not be a part of the classified service.
- (c) Unless otherwise permitted, a person whose position does not require certification qualifications shall not be employed by a governing board of a school district, except as authorized by this section.
- (d) As used in this section:
- "Substitute employee" means a person employed to replace a classified employee who is temporarily absent from duty. In addition, if the school district is then engaged in a procedure to hire a permanent employee to fill a vacancy in any classified position, the governing board of the school district may fill the vacancy through the employment, for not more than 60 calendar days, of one or more substitute employees, except to the extent that a collective bargaining agreement then in effect provides for a different period of time.

(2) “Short-term employee” means a person who is employed to perform a service for the school district, upon the completion of which, the service required or similar services will not be extended or needed on a continuing basis. Before employing a short-term employee, the governing board of a school district, at a regularly scheduled board meeting, shall specify the service required to be performed by the employee pursuant to the definition of “classification” in subdivision (a) of Section 45101, and shall certify the ending date of the service. The ending date may be shortened or extended by the governing board of a school district, but shall not extend beyond 75 percent of a school year.

- (3) “Seventy-five percent of a school year” means 195 working days, including holidays, sick leave, vacation, and other leaves of absence, irrespective of number of hours worked per day.
- (e) Employment of either full-time or part-time students in any college work-study program, or in a work experience education program, shall not result in the displacement of classified personnel or impair existing contracts for services.
- (f) This section **shall apply only** to school districts not incorporating the merit system as outlined in Article 6 (commencing with Section 45240).

Education Code 45256

- **45256.** (a) The commission shall classify all employees and positions within the jurisdiction of the governing board of the school district or of the commission, except those that are exempt from the classified service, as specified in subdivision (b). The employees and positions shall be known as the classified service. “To classify” shall include, but not be limited to, allocating positions to appropriate classes, arranging classes into occupational hierarchies, determining reasonable relationships within occupational hierarchies, and preparing written class specifications.
- (b) All of the following are exempt from the classified service:
 - (1) Positions that require certification qualifications.
 - (2) Full-time students employed part time.
 - (3) Part-time students employed part time in a college work-study program, or in a work experience education program conducted by a community college district pursuant to Article 7 (commencing with Section 51760) of Chapter 5 of Part 28 of Division 4 and that is financed by state or federal funds.
- (4) Apprentice positions.

- (5) Positions established for the employment of professional experts on a temporary basis for a specific project by the governing board of the school district or by the commission when so designated by the commission.

- (c) (1) Employment of either full-time or part-time students in a college work-study program, or in a work experience education program shall not result in the displacement of classified personnel or impair existing contracts for services.

- (2) Nothing in this section shall prevent an employee, who has attained regular status in a full-time position, from taking a voluntary reduction in time and retaining his or her regular status under the provisions of this law.

- (d) A person whose contribution consists solely in the rendition of individual personal services and whose employment does not come within the scope of the exceptions listed above shall not be employed outside the classified service.

- (e) A part-time position is one for which the assigned time, when computed on an hourly, daily, weekly, or monthly basis, is less than 87½ percent of the normally assigned time of the majority of employees in the classified service.

- (f) An employee employed by a school district in a part-time playground position as of the effective date of the laws placing part-time playground positions into the classified service shall be deemed a permanent employee of the school district without placement on an eligibility list under Section 45272 or examination under Section 45273.

Board Member

- Board Member are not employees per California Government Code.
 - They are **elected officials**.
- Board members, per Internal Revenue System, are treated as employees for tax purposes
 - They do not require a credential, so they would be set up as a classified employee in payroll.
 - They are paid thru payroll.
 - Their pay is subject to taxes, but will not have SUI deductions.
 - If a board member was elected prior to 7/1/1994 they may be a member of the Public Employee Retirement System (PERS), otherwise no retirement benefits. (Gov. Code 20361)
 - Board members are not eligible under the 403(b) regulations to participate in a 403(b) plan.

Retiree

- Same duties
- Pay through payroll
- Watch tax rules
- Medicare applies when rehired, regardless of age
- OASDI exempt unless working in a classification other than their regular retirement classification

Retirees – CalSTRS *(California State Teachers Retirement System)*

- CalSTRS Post Retirement Employment
 - Earnings Limitation for 2021-22 = \$48,428
 - Must wait 6 months (180 days) before returning to work with a CalSTRS employer
 - Will reduce their retirement benefit dollar for dollar by an amount equal to their earnings

Education Code 45134

- No person shall be employed in school employment while he or she is receiving a retirement allowance under any retirement system by reason of prior school employment, except that a person may be hired:
 - Pursuant to Article 8 (commencing with Section 21220) of Chapter 12 of Part 3 of Division 5 of Title 2 of the Government Code.
 - As an aide in one of the following circumstances:
 - An aide is needed in a class with a high pupil-teacher ratio.
 - An aide is needed to provide one-on-one instruction in remedial classes or for underprivileged students.
 - A person working as an aide pursuant to this subdivision shall not receive

service credits for purposes of the State Teachers' Retirement System.

Retirees – CalPERS (*California Public Employees Retirement System*)

- CalPERS Retirement Summary of Regulations
 - After January 1, 2013, retiree must wait 6 months (180 days) before they can return to work with a CalPERS employer
 - Limited by hours if skills needed (960 hours)
 - Limited by receipt of unemployment within previous 12 months
 - Form DPA 715 provides additional information

CalSTRS and CalPERS rules on hiring retirees:

<u>CalSTRS Retiree – Certificated</u> <i>(Credential required)</i>	<u>CalPERS Retiree – Classified</u>
Earnings Limitation for 2021-22 = \$48,428	Hours Limitation, cannot exceed 960 work hours
Can be hired after 6 months (180 Days) before returning to work with a CalSTRS employer	Can be hired after 6 months (180 Days) before returning to work with a CalPERS employer
Working prior to 6 months, or exceeding the Earnings limitation will create penalties and reduce their retirement benefit dollar for dollar	Working prior to 6 months, CalPERS will reinstate retiree to active membership.
Cannot be hired in a classified position. <i>Reference: Ed Code 45134</i>	Cannot be hired if they received Unemployment Benefits within the previous 12 months

<https://www.calstrs.com/general-information/working-after-retirement>

<https://www.calpers.ca.gov/page/retirees/working-after-retirement>

