

## **IRS Rulings on Independent Contractor Determination**

Reviewed: December 27, 2011

In the context of the University settings, several factors are commonly considered in distinguishing between independent contractors and employees. Many of these are drawn from Private Letter Rulings (PLR's). Although PLR's do not constitute precedent applicable to other taxpayers, they do provide insights into how the service applies Form SS-8 ([PDF](#)).

### **Instructional/Teaching**

The University of Nevada, Reno, is an institution of higher education in the general business of teaching and instruction. The University will generally consider all payments for teaching services to be employment-related, based on the following IRS rulings.

### **Revenue Ruling 70-308**

A school retained part time instructors to teach courses for certain occupations in the airline industry. Each of the instructors had work experience in the area of instruction; the courses were scheduled during hours that would not conflict with their regular jobs. The instructors followed the school curriculum and were subject to “periodic observation as to...teaching techniques”. The school could terminate the relationship “if the instructor [did] not follow the curriculum”.

There were indications of an independent contractor (an independent business or occupation and termination only if the instructor [did] not follow the curriculum), yet the school retained a significant degree of control. It was the school's curriculum. The instructor was required to follow the school's instructions. The instructor was subject to periodic observation. The service determined the instructors to be employees.

### **Revenue Ruling 70-338**

Teachers performed two types of services for a music conservatory: first as instructors of regular classes offered by the conservatory and second as instructors of their own pupils in private lessons. As to the first type of service, it is no surprise that the service determined those teachers to be employees. As to the second, the service discussed the many factors which comprise the relationship between the conservatory and teacher (few of which are typically encountered by the university), concluding that “the conservatory does not exercise, or have the right to exercise, over the teachers in the second group the degree of direction and control necessary to establish an employer-employee relationship under the usual common law rules”. Again, note the emphasis on control.

### **Revenue Ruling 70-363**

A private college hired lawyers from the community to teach law classes as part of the regular curriculum for the school year. The following quote, illustrates a number of the factors previously mentioned:

“An important consideration in the determination of the existence of an employer-employee relationship, as distinguished from the status of an independent contractor, is whether the contract for services is made with one engaged in a business distinct and independent of the person contracting for the services. Although the instructors of the law college are outstanding members of the legal profession, the contracts for their services as instructors are with reference to the regular business of the college, and the instructors, in so far as their relationship to the college is concerned, are not engaged in an independent calling. On the contrary, the facts show that the college retains the right to control and direct the instructors and the substitute instructors to an extent sufficient to establish the legal relationship of employer and employee.”

Although engaged in a distinct and independent business, the instructors, “in so far as their relationship to the college is concerned, also are engaged in the ‘regular business of the college’”. The Service concludes that the college “retains the right to control and direct instructors”.

## **PLR 8728022**

A college retained an instructor to teach an art class which met each Friday for a three hour period. He was paid a lump sum for his services. He performed similar services “for others with only 25 percent of his professional time spent in service to the college”. He “reported personally to the college or its representative once per week for consultation”. Despite some indications of an independent contractor relationship, the service concluded that the instructor was an employee. “Although the class was part-time employment for the worker, the relationship with the college was continuous in nature...the worker's services were necessary and incident to the business conducted by the college, and the worker was not engaged in an independent enterprise in which the worker assumed the usual business risks. The worker's investment in art supplies was not of a substantial nature”.

The IRS dismissed the fact that the instructor was engaged in an “independent business” (with only 25 percent of his professional time spent in service to the college), in light of several factors:

- His services were integral to the business conducted by the college;
- He was thought not to have incurred the “usual business risks” of a bona fide business;
- He had little investment in his “business”; and
- His service with the college was continuous.

The IRS goes on to articulate how little control is necessary to constitute that “degree of direction and control necessary to establish an employer-employee relationship under the common law rules”. It does not take much.

“While the college may not have exercised rigid control over how each class was taught, the college of necessity exercised control over the curriculum, the facility, and the scheduling of classes, and the college consulted with the worker weekly regarding the performance of the teaching services”.

## **PLR 8801019**

A dance studio retained instructors to conduct dance classes on a mutually agreed upon schedule for approximately four hours per week. The instructors provided similar services for other dance studios, however this particular dance studio “has priority on the time” agreed upon by the instructor and the studio. The instructors may be terminated “at any time without incurring a liability”.

In finding that the instructors are “subject to certain restraints and conditions that are indicative of the firm's/studio's control over them,” the IRS points to the following factors:

“The instructors render their services personally. They have a continuous relationship with the firm as opposed to a single transaction. Their services are an integral part of the firm's business. The instructor's wages are based on an hourly rate. They perform their services at the firm's studio and are furnished with stereo equipment and records. They do not incur any expenses while teaching their classes for the firm. Either the firm or the instructors may terminate the agreement for services at any time without incurring a liability. These factors indicate the existence of an employer-employee relationship.”

## **PLR 8925001**

Although this ruling addresses various classes of adjunct faculty at a tax-exempt university, the most significant relationship was that of adjunct faculty engaged at the law school. The adjunct faculty were retained under contracts to teach specific courses; the adjuncts practiced or had practiced law as a primary career; payments for services were based on the faculty members' experience and complexity of the course; payments for services were made in a lump sum at the end of the contract term; no payments were made if the course was canceled due to low enrollment; the contracts required the adjuncts to perform the services personally or obtain a substitute approved by the university; the university could terminate an adjunct faculty member effectively with no further liability to that person; and the adjunct faculty members were subject to evaluation and further approval before their contracts were renewed.

The university's relationship with adjunct faculty differed significantly from its relationship with regular faculty in ways that arguably pointed toward independent contractor status. Adjunct faculty were hired only for a particular course and term, were compensated by the course in a lump sum, received no fringe benefits, received separate compensation for working with a student on independent study, were not paid for a course canceled for low enrollment, were not provided with offices or other space for course preparation, were subject to only informal student evaluations and did not participate in the academic business of the university.

The IRS ruled that the adjunct faculty were employees and maintained that they were subject to certain restraints and conditions indicative of the university's control over them, regardless of their continuous or temporary relationship with the university.

#### **PLR 8951039**

In connection with the state department of motor vehicles and the division of alcohol abuse, an institution of higher learning offered a driving course for persons convicted of driving while under the influence. The institution contracted with instructors and stipulated that they were to be treated as independent contractors. Any instructor could hire substitutes or helpers. The contract stated that institution did not provide staff support, office space or supplies; but in fact the institution did so. The IRS considered the instructors employees of the institution.

#### **PLR 9105007**

The IRS applied the common law factors in concluding that part-time instructors at a public community college were employees, not independent contractors. Most of the instructors held other full-time jobs and taught only one course during the semester. The college did not have a main campus; classes were held at various community buildings. The college did not prescribe course content. The instructors were paid a flat amount per course in two lump sum installments. The college could terminate the instructor if he/she breached the conditions of the professional services agreement. However, if the college terminated the instructor without cause, it had to pay him/her for the full semester.

Notwithstanding these facts, the IRS relied on other factors in finding the instructors to be employees. The instructors had to meet with a college representative for course planning and had to comply with college rules and regulations. Their services were an integral part of the college's business and were expected to be provided personally. Courses were taught at regular intervals during the contract period. The college set class schedules, required the instructors to submit attendance reports and furnished copy machines, computers and other equipment needed. The instructors had no investment in facilities and were not compensated based on profit or loss.

### **Principal Investigators: Revenue Ruling 55-583**

The question of employment status also has arisen where professors perform research under grants and hire others to assist them. One case involved a professor employed to teach at a state college and designated by the college to carry out a research project under a foundation grant. The professor continued to draw his salary as a professor and received additional compensation from the grant funds for time spent on research in excess of his regular teaching time. The professor hired and supervised a stenographer who was paid by the college out of the grant funds. The IRS held both to be employees of the college.

### **Student Aides: PLR 9216021**

A private university has internship program where the university's students perform services as substitute teachers or teacher's aides. The university receives payment for the student's services and the students receive paid tuition and fees for books and supplies. The IRS held that the students were the private university's employees.

### **Musicians: PLR 9123010**

A musician was hired on a concert-by-concert basis by a nonprofit organization. The organization does not train the musician, but instructs and supervises through its orchestra director. The organization requires the musician to be present at rehearsals and concerts on time, and has first call on his services. The musician provides his own instrument and concert attire,

and is free to compete and advertise for similar engagements. The IRS ruled that the organization exercises the degree of control indicative of an employer-employee relationship.

**Medical: PLR 8937039**

Doctors who provided services to patients of a clinic, as assigned by the clinic, in the offices of the clinic on specified days, are employees of the clinic, even though they may maintain private practices and hold themselves out to the public as performing for their own account, the same services provided for the clinic.

**PLR 9236004**

A professional medical corporation provides emergency room services, engaging workers pursuant to an oral agreement. Workers are engaged to provide services for a specific shift and may be fined if that shift is missed, but they are free to select the shift they prefer. Workers' services must be performed personally, although they may find a replacement from other workers who perform services for the hospital. The workers are paid weekly for the time worked. All tools, equipment, materials, and supplies are provided by the hospital except for personal hand tools. The IRS rules that the emergency room staffers are employees of the professional medical corporation.

**PLR 9041007**

A manufacturer of telephone equipment engages nurses to provide care for its employees, to conduct audio and orthorator testing, to maintain medical records, and to perform certain other medical procedures. The nurses work pursuant to contracts which identify them as consultants and independent contractors. The agreements prohibit the hiring of substitutes by the nurses, permit either party to terminate the relationship after two weeks notice without incurring a liability, and require nurses to buy malpractice insurance in stated amounts. The nurses are compensated with an hourly wage with no guarantee of a minimum amount of pay and no fringe benefits. They are permitted to perform similar services for others, but do not advertise or

otherwise attempt to do so. They have no financial investment in a business relating to the work they do for the manufacturer. The IRS ruled that the nurses are employees.