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INDEPENDENT CONTRACTOR OR EMPLOYEE 20 FACTORS OF CONTROL: ADDITIONAL INFORMATION

The South Dakota Bureau of Human Resources (BHR) developed this document to provide agencies with additional information about the 20 factors to consider when determining if a relationship with an individual is that of an independent contractor. The following information was provided by the Internal Revenue Service and does not constitute legal advice. Agencies requesting additional information or assistance may contact legal counsel or BHR.

Behavioral Control

- 1. Instruction:** An individual who is required to comply with the State's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the State has the **right** to require compliance with such instructions, even if the State does not exercise that right.
- 2. Training:** Training an individual by requiring an experienced employee to work with the person, by corresponding with the person, by requiring the person to attend meetings, or by using other methods of training indicates that the State wants the services performed by the individual in a particular method or manner.
- 3. Order of Sequence Set:** If an individual is required to perform services in the order or sequence set by the State, that factor shows that the individual is not free to follow his or her own pattern of work, but must follow the established routines and schedules of the State. Often, because of the nature of an occupation, the State does not set the order of the services or set the order infrequently. However, it is sufficient to show control if the State retains the right to do so.
- 4. Oral or Written Reports:** A requirement that the individual submit regular or written reports to the State indicates a degree of control.
- 5. Set Hours of Work:** The establishment of set hours of work by the State is a factor indicating control.
- 6. Services Rendered Personally:** If the services must be rendered personally, presumably the State is interested in the methods used to accomplish the work as well as in the results. On the other hand, generally an independent contractor can delegate tasks to others.
- 7. Full Time Required:** If the individual must devote substantially full time to the business of the State as a result of the contract, the State has control over the amount of time the individual spends working and impliedly restricts the individual from doing other gainful work. On the other hand, an independent contractor is free to work when and for whom he or she chooses.

8. Doing Work on Employer's Premises: If the work is performed on the premises of the State, that factor suggests control over the individual, especially if the work could be done elsewhere. Work performed off the State's premises, such as at the office of the individual, indicates some freedom from control. However, this fact by itself does not mean that the individual is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which the State generally would require that employees perform such services on the State's premises. Control over the place of work is indicated when the State has the right to compel the individual to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

Financial Control

9. Payment by Hour, Week, or Month: Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates that the individual is an independent contractor.

10. Payment of Business or Traveling Expenses: If the State ordinarily pays the individual's business or traveling expenses, the individual is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the individual's business activities.

11. Furnishing of Tools and Materials: The fact that the State furnishes significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

12. Hiring, Supervising, and Paying Assistants: The fact that the State hires, supervises, and pays assistants generally shows control over the individual's job. However, if the individual hires, supervises, and pays the assistants pursuant to a contract under which the individual agrees to provide materials and labor and the individual agrees to be responsible only for the attainment of a result, this factor indicates an independent contractor status. Independent contractors typically hire and pay their own staff.

13. Significant Investment: If the individual invests in facilities that are used by the individual in performing services and are not typically maintained by the State (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate the individual is an independent contractor. On the other hand, lack of an investment in facilities indicates dependence on the State for such facilities, which further indicates an employer-employee relationship. Special scrutiny is required when it comes to certain types of facilities, such as home offices.

14. Realization of Profit or Loss: An individual who can realize a profit or suffer a loss as a result of the individual's services (in addition to the profit or loss ordinarily realized by an employee) is generally an independent contractor, but the individual who cannot is an employee.

For example, if the individual is subject to real risk of economic loss because of significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. However, the risk that the individual will not receive payment for his or her services is common to both independent contractors and employees, thus it does not constitute a sufficient economic risk to support treatment as an independent contractor.

15. Working for More Than One Firm at a Time: It is indicative of an independent contractor relationship if the individual performs more than de minimis services for a multiple of unrelated persons or firms at the same time. However, an individual who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service agreement.

16. Making Service Available to the General Public: It is indicative of an independent contractor relationship if the individual makes his or her services available to the general public on a regular and consistent basis.

Relationship of the Parties

17. Integration: Integration of the individual's services into the agency's operations generally shows that the individual is subject to direction and control, which is indicative of an employer-employee relationship. When the success or continuation of an agency depends to an appreciable degree upon the performance of certain services, the persons who perform those services must necessarily be subject to a certain amount of control by the agency.

18. Continuing Relationship: It is indicative of an employer-employee relationship when there is a continuing relationship between the individual and the State. A continuing relationship may exist where work is performed at frequently recurring, although irregular, intervals. See *United States v. Silk*.

19. Right to Discharge: The right to discharge the individual is a factor indicating that the individual is an employee and the State is an employer. The State exercises control through the threat of dismissal, which causes the individual to obey the State's instructions. Alternatively, an independent contractor cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

20. Right to Terminate: An employer-employee relationship is indicated when the individual has the right to end his or her relationship with the State at any time he or she wishes without incurring liability. On the other hand, an independent contractor typically incurs liability imposed by the contract or by law.

If you have questions, please contact:

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