Information Sheet – 04/21/2020 - Board of Trustees Meeting

TO: Board of Trustees Item: 8.3

FR: Celli Coeville

DATE: April 13, 2020

RE: Revised Board Policy, BP 3600, Consultants, Consider for Adoption

Board Policy, BP 3600, has been updated to reflect NEW LAW (AB 5) which codifies a three-part test, established in *Dynamex Operations West Inc. v. Superior Court of Los Angeles*, to determine whether a person providing services for remuneration should be classified as an employee or an independent contractor. The policy also updates the statement on nondiscrimination to include additional protected categories, and reflects law regarding harassment of or by an independent contractor.

I've highlighted the proposed changes and indicated the differences in red font.

Recommended Action: Approve Revised BP 3600, Consultants

CONSULTANTS

The Board of Trustees authorizes the use of consultants and other independent contractors to provide expert professional advice or specialized technical or training services which are not needed on a continuing basis and which cannot be provided by district staff because of limitations of time, experience, or knowledge. Individuals, firms, or organizations employed as ~~consultants~~ independent contractors may assist management with decisions and/or project development related to financial, economic, accounting, engineering, legal, administrative, instructional, or other matters.

(cf. 3551 – Food Service Operations/Cafeteria Fund)

Note: Labor Code 2750.3, as added by AB 5 (Ch. 296, Statutes of 2019), codifies the three-part "ABC" test established in Dynamex Operations West, Inc. v. Superior Court of Los Angeles to determine whether a person providing services for remuneration should be classified as an employee or an independent contractor. Although Labor Code 2750.3 does not explicitly state whether it applies to public agencies, CSBA recommends that districts adhere to its provisions.

AB 5 also amended Unemployment Insurance Code 606.5 and 621 to incorporate the three-part ABC test from the Dynamex decision. Since public school employers are subject to certain provisions in the Unemployment Insurance Code, districts should apply the three-part ABC test to determine a worker's eligibility for unemployment benefits.

Pursuant to Labor Code 2750.3, a person is considered to be an independent contractor rather than an employee if the person (1) is free from the control and direction of the district in connection with the performance of the work, (2) performs work that is outside the usual course of providing educational services, (i.e. services provided by the person's own independent business and not services that ordinarily would be performed by district employees), and (3) is customarily engaged in an independently established trade, occupation, or business.

Labor Code 2750.3 establishes exceptions to the use of the three-part ABC test, including (1) when a person's status as an employee or independent contractor is defined by the Labor Code, Unemployment Insurance Code, or an applicable wage order of the Industrial Welfare Commission; (2) when a court rules that the three-part test cannot be applied to a particular context; or (3) when specifically exempted within Labor Code 2750.3. Under the second and third scenarios, the determination of whether a person is an employee or independent contractor is then made pursuant to the court's decision in S.G. Borello & Sons, Inc. v. Department of Industrial Relations, which made employment status a fact-dependent ruling based on the extent to which the employer had a right to control the work that was being done. Tutors are potentially excepted from the three-part test in Labor Code 2750.3 if they develop and teach their own curriculum, but not if they teach a curriculum created by a public school or contract with a public school through a referral company.

As this area of law is complex and may alter the legal and financial obligations of the district to particular workers (e.g., eligibility for workers compensation, unemployment and disability insurance benefits, and district health and welfare benefits), legal counsel should be consulted when questions arise regarding the status of those who provide services to the district for remuneration.

As part of the contract process, the Superintendent or designee shall determine, ~~in accordance with Internal Revenue Service guidelines,~~ that the ~~consultant~~ individual, firm or organization is properly classified as an independent contractor. A person, firm, or organization shall be considered an employee rather than an independent contractor unless the district is able to demonstrate that all of the following conditions have been met: (Labor Code 2750.3)

1. The person or entity is free from the control and direction of the district in connection with the performance of the work.

CONSULTANTS

2. The person or entity is performing work that is outside the usual course of the district providing educational services.

3. The person or entity is customarily engaged in an independently established trade, occupation, or business of the same nature as the work to be performed.

Specific statutory exceptions to this analysis for the determination of whether a person, firm, or organization is an independent contractor may apply. (Labor Code 2750.3)

~~District employees who perform extra-duty consultant services shall not be retained as independent contractors. They shall be considered employees for all purposes, even if the additional services are not related to their regular duties.~~

~~*(cf. 4117.12/4317.12 – Retirement Consultancy Contracts)*~~

All consultant contracts shall be brought to the Board for approval.

(cf. 3311 –Bids)
(cf. 3312 – Contracts)
(cf. 4132/4232/4332 – Publication or Creation of Materials)

~~The district shall not contract for consulting services that can be performed without charge by a public agency or official unless these services are unavailable from the public source for reasons beyond the district's control.~~

All qualified ~~firms or resource persons~~ independent contractors shall be accorded equal opportunity for ~~consultant~~ contracts regardless of actual or perceived race, creed, color, ~~gender, national or ethnic origin, age or disability.~~ national origin, ancestry, age, religious creed, marital status, pregnancy, physical or mental disability, medical condition, genetic information, military and veteran status, sex, sexual orientation, gender, gender identity, gender expression, immigration status, or association with a person or group with one or more of these actual or perceived characteristics. (Education Code 220; Government Code 12940)

(cf. 0410 – Nondiscrimination in District Programs and Activities)
(cf. 0415 – Equity)
~~*(cf. 3311 – Bids)*~~
~~*(cf. 3551 – Food Service Operations/Cafeteria Fund)*~~
(cf. 4030 - Nondiscrimination in Employment)

Independent contractors ~~applying for a consultant contract~~ shall submit a written conflict of interest statement disclosing financial interests as determined necessary by the Superintendent or designee, depending on the range of duties to be performed by the consultant. The Superintendent or designee shall consider this statement when deciding whether to recommend ~~the consultant's employment~~ approval of the contract.

(cf. 9270 - Conflict of Interest)

When employees of a public university, county office of education, or other public agency

CONSULTANTS

serve as consultants or ~~resource persons~~ independent contractors in other capacities for the district, they shall certify as part of the ~~consultant~~ agreement that they will not receive salary or remuneration other than vacation pay from any other public agency for the specific days when they work for ~~this~~ the district.

Note: Pursuant to Government Code 12940, certain protections afforded to employees are extended to independent contractors; see BP/AR 4030 - Nondiscrimination in Employment. Government Code 12940 also provides that the district may be held liable for sexual harassment committed against employees by nonemployees, including independent contractors, if the district knew, or should have known, of the harassment and failed to take immediate and appropriate corrective action to stop the harassment.

The Board prohibits the harassment of an independent contractor by any district employee or by any other person with whom the independent contractor comes in contact during the course of employment with the district. Additionally, the Board prohibits the harassment of a district employee by an independent contractor. Any complaint of harassment shall be investigated and resolved in accordance with applicable district complaint procedures. (Government Code 12940)

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)

Legal References:

EDUCATION CODE
220 Prohibition of discrimination
10400-10407 Cooperative improvement programs 17596
Limit on continuing contracts
35010 Control of districts; prescription and enforcement of rules 35172(a)
Promotional activities
35204 Contract with attorney
44925 Part-time readers employed as independent contractors
45103 Classified service in districts not incorporating the merit system
45103.5 Contracts for food service consulting services
45134-45135 Employment of retired classified employee
45256 Merit system districts; classified service; positions established for professional experts on a temporary basis
GOVERNMENT CODE
12940 Unlawful employment practices
53060 Contract for special services and advice
82019 Designated employee
87302 Conflict of interest code
LABOR CODE
2750.3 ABC three-part test: employees and independent contractors
UNEMPLOYMENT INSURANCE CODE
606.5 Determination of employment status
621 Employer and employee defined
CODE OF REGULATIONS, TITLE 2
18700.3 Consultant
COURT DECISIONS
Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal. 5th 903 S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341
~~*Management Resources:*~~
~~*INTERNAL REVENUE SERVICE PUBLICATIONS*~~
~~*15-A Employer's Supplemental Tax Guide*~~