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TO: Will Chapman, Executive Director, Louisiana Press Association

FROM: Scott L. Sternberg

DATE: 9/4/2019

IN RE: Independent Contractors

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Will –

You have asked me to provide a brief overview of the independent contractor designation under Louisiana law. As we have discussed, our members use independent contractors for contract journalism and business work, including delivery of newspapers.

The primary difference between an independent contractor and an employee relates to control. The Louisiana Workforce Commission specifically advises that every person employed by a business is an employee unless:

- 1. They are free from direction and control in performing the work;**
- 2. They perform work that is not usual for the hiring business or that is not performed on the business' premises; and**
- 3. The contractor is engaged in an independently established trade, occupation, profession or business.**

This test is found at La. R.S. 23:1472(12)(E). It is more general language that is specifically proven (or disproven) by a multi-factor test the Louisiana Workforce Commission employs based on the facts present and unique to each situation. If these factors are not met, the individual is an employee and must pay all the appropriate employment taxes and withholdings. Our members should wary of misclassification, and **always consult an attorney of their choosing if there is any question whatsoever.**

In performing an audit, the Louisiana Workforce Commission specifically reviews the following factors as to whether or not the individual is an employee or an independent contractor. The factors are numerous. In addition, a jurisprudential test exists for lawsuits against newspapers and contesting employment/independent contractor relationships.<sup>1</sup>

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<sup>1</sup> See, e.g., *Adams v. Times-Picayune Pub. Corp.*, 418 So.2d 685 (La. App. 4 Cir. 1994); *Whitlow v. Shreveport Times*, 843 So.2d 665 (La. App. 3 Cir. 2003).

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The LWC's factors which they believe indicate that the relationship is employment and not independent contractors:

1. The individual's services are performed on the business premises of the company.
2. The individual has no financial investment in an ongoing business related to the services the individual is performing.
3. The company provides supplies, materials, and necessary tools and equipment.
4. The company provides training to the individual in the performance of the services.
5. The company's duties to third parties would require that the company maintain control over the individual's performance of service.
6. The individual uses the company's business name in the performance of the services.
7. The individual is required or expected to personally perform the services.
8. The individual is required to report on a periodic basis the services performed, the amount of time the individual spent in performing the services, or other details as to the performance of services.
9. Effective operation of the company's business requires that the individual be supervised or controlled in the performance of service.
10. Representation (explicitly or implicitly) is made by the company to customers or the general public that the individual is an employee of the company.
11. No written contract or agreement exists between the company and the individual.
12. The company can terminate the individual's services at any time without liability for damages.
13. The individual does not have a separate business address or telephone number.
14. The individual is prohibited from competing with the company either during the time services are performed for the company or for any period thereafter.
15. The service performed is of an unskilled nature.
16. The type of service performed by the individual is the only service, or a major part of the service, that the company provides.

17. The individual has no separate insurance coverage for liability in connection with the services performed.
18. The individual has no other similar relationships with companies for which the individual performs similar services.
19. The individual is paid on a piece-rate or hourly basis rather than for a short-term project or job.
20. The arrangement is for ongoing, continuous services rather than for a short-term project or job.
21. The individual is established to the extent of being financially dependent on the company and cannot survive economically if no longer providing services for the company.
22. The individual is required or encouraged to keep regular hours or to perform services only during the company's regular hours

The LWC's factors which they believe indicate that the relationship is that of an independent contractor, and not employment, are:

1. The individual owns a place of business separate from that of the company.
2. Equipment, supplies, and facilities are provided by the individual.
3. Expenses for travel and entertainment and for licensing and occupational permits are paid by the individual.
4. The individual has other similar arrangements for the performance of services with other companies.
5. The individual receives payment by lump sum or contract rate rather than by an hourly or piecework basis.
6. The individual is publicly available to perform similar services for others and does in fact perform such services for others.
7. The service is of a professional or technical nature, the details of which are outside the usual course of business and best left to the discretion of the individual.
8. The arrangement between the individual and the company is in the form of a written agreement that has a specific contract amount and a definite term.
9. The individual advertises for the performance of services.

Finally, the LWC considers the following general considerations:

1. Each case has to be considered on its own facts, and the factors tending to indicate one or the other relationship have to be weighed against each other.
2. If an employer has “general control” over the manner in which the services are performed, employment (as opposed to independent contractor status) is likely.
3. A written contract can be “indicative, but not determinative, of independent contractor status.” The LWC states that the lack of a written contract does not necessarily mean that the relationship is employee-employer, but a written contract also does not automatically mean the employee is an independent contractor.

As our members can see from the LWC guidance, there are numerous factors which the LWC considers before determining whether an independent contractor has been misclassified. In addition, there is a jurisprudential test which can come into play in any court contest involving independent contractor status. This test examines the following factors:

1. **Right of Control and Supervision of the Employee**
2. **Selection and Engagement of the Employee**
3. **Payment of Wages vs. Contracted Amounts**
4. **Power of Dismissal**

Under both the LWC guidance and the jurisprudential test, it is easy to see clear benchmarks which mark an independent contractor relationship. The right of control, particularly, is the most important. Both the statutory and jurisprudential tests turn largely on whether the employer has control over the employee or contractor.

### **Best Practices for Independent Contractors**

As members can see from the extensive tests in this memorandum, there is no one-size-fits-all or magic formula to ensure that an individual is classified as a contractor as opposed to an employee. There are, however, best practices which can help you defend against any audit or challenge to contractor status. Having a written contract can assist, but is not necessarily determinative. The contracts should include provisions that allow either side to terminate the relationship—with notice. The way independent contractors are paid – by the piece or by the job, as opposed to by the hour – is also incredibly important. Independent contractors that supply their own tools and work outside the office are more likely to be classified as contractors and not employees. Independent contractors should be free to work for other publications, and be paid by the piece.

Members should be wary of classifying individuals as independent contractors – and should be advised to consult with an attorney if there are any questions whatsoever as to that individual’s status.