

# High school athletic game officials: independent contractors or employees?

By Tim Heenan

## WHO CARES?

1. **The IRS!** It may think that you have not been paying your fair share of taxes.

2. **Your state government!** It shares the IRS' desire for your hard-earned dollars.

### 3. You should!

In recent years, the specter of back taxes has reared its ugly head in the form of government judgments against individuals, associations and state offices who for years have been treating their game officials as independent contractors. In 1995, the Washington Interscholastic Activities Association was held liable for back taxes for the 1992-93 school year to

the tune of \$13,048. In that same year, the Pacific Northwest Basketball Officials Association was assessed back taxes of \$110,112. The size and timing of these liabilities is significant enough that you should be asking yourself if such a fate could befall your officials association.

So . . . what are you? Independent contractor? Employee? To arrive at the answer to that question, the government agencies will ask one general question: "How much **control** does the assigning and/or paying agent have over the game official?" This control **does not have to be actual control** over a person's actions, but the **right to control** an official is considered enough to have the government declare you or the officials in an organization to be an "employee." The control issue is answered by applying 20 factors to the hiring firm/employee relationship. (see article on facing page regarding independent contractors) What makes this problematic for officials is that you may meet 18 of the 20 criteria and still be declared an employee; or the IRS may have previously said that, in the same circumstances, the officials were independent contractors. You are, in effect, at their mercy.

You should understand that state and federal agencies often are at opposite ends of the spectrum on this issue. For state governments, there is the workers' compensation concern as well as your state's income tax agency; for the IRS there are income and Social Security tax issues.

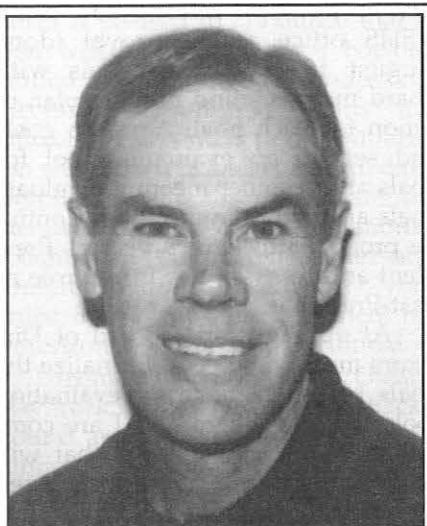
Addressing the state issue first, your best action would be a law protecting officials from the state's employee codes for both workers' compensation and income tax purposes. Several officials in concert guided a bill through the state legislature in California in 1995 simply stating that, for workers' compensation issues, amateur athletic officials were independent contractors. In addition, two individuals, Don Collins and Bob Summers, helped the state franchise tax board write regulations to ensure independent status for officials. Section 4304-10 of the California Unemployment Insurance Code spells it

out as clearly as possible: "In general, if the principal (assignor, school, etc.) does not have the right to control the amateur athletic official's **decisions during a contest**, the worker is an independent contractor." Since there are no circumstances of which I am aware in which anybody controls an official's actions during a contest, the language of that document could be beneficial in your state.

In recent years, there have been a number of states that have had either legislative or judicial actions ensuring the independent contractor status of high school officials. The most recent is the state of Virginia under the leadership of Jim Chandler and William Herbert. Other states with statutory protection for officials are Alaska, Idaho, Missouri, Montana and Oregon. The following states have had judicial interpretations making officials independent contractors: Arizona, Colorado, Louisiana, Maryland, New Jersey, New York and South Carolina. Because judicial decisions can be overturned, a legislative solution is always preferable. If you wish some advice on how to proceed in your state with such legislation, you may contact Don Collins in San Francisco at 415-673-1505.

The second concern, the federal issue, is clouded by the inconsistent and often contradictory rulings by individual Internal Revenue Service agents. Your best solution, short of legislative relief, would be to insulate yourself from the control exerted over game officials. If you are the paying or the assigning agent, do not require officials to attend clinics, take exams, file reports or submit themselves to mandatory evaluations. If you are in a state office, you would be better off if the actual game assignments were made by a third party who was not an employee of your office.

The optimum situation for all of us in the United States is for federal legislation to declare that amateur athletic officials are independent contractors. To that end, several individuals have been working with Dick Kruse, the NFHS' consultant in Washington, DC. We expect to report future developments in this journal.



**ABOUT THE AUTHOR:** Heenan, who is a native of San Jose, California, served on the NFIOA Board of Directors from 1991 to 1996, where he was president (1994-95), vice president and secretary. From 1990 to 1996, Heenan was commissioner of officials in Santa Clara (California) County in which he supervised the hiring, training, assigning and evaluation of 650 athletic officials in 10 sports for 52 high school programs. Presently living in Victoria, British Columbia, Canada, Heenan is a part-time business consultant and officiates high school basketball and baseball and college basketball.

# Who is an independent contractor?

An independent contractor is an independent businessperson who is hired to perform a specific task. He/she is just like any other vendor, except services are provided rather than goods. He/she is not a company's employee and is not eligible for unemployment, disability or workers' compensation benefits. The hiring firm does not have to pay employee/employer taxes or provide workers' compensation insurance, and usually is not liable for the contractor's actions.

The **KEY FACTOR** that determines whether a worker is an employee or an independent contractor is **WHO HAS THE RIGHT TO CONTROL THE WORKER AS TO HOW THE WORK IS ACCOMPLISHED**. Whether or not you actually exercise control over the worker is **IRRELEVANT**. The key is whether you had the **RIGHT** to control the worker.

The IRS uses these factors to measure how much control a hiring firm has over its workers. Those factors are:

## 1. No instructions

Contractors are not required to follow, nor are they furnished with, instructions to accomplish a job. However, they can be provided job specifications by the hiring firm.

## 2. No training

Contractors typically do not receive training by the hiring firm. They use their own methods to accomplish the work.

## 3. Services don't have to be rendered personally

Contractors are hired to provide a result and usually have the right to hire others to do the actual work.

## 4. Work not essential to the hiring firm

A company's success or continuation should not depend on the service of outside contractors. An example violating this would be a law firm that called its lawyers independent contractors.

## 5. Set own work hours

Contractors set their own work hours.

## 6. Not a continuing relationship

Contractors usually don't have

a continuing relationship with a hiring company. The relationship can be frequent, but it must be at irregular intervals, on call, or whenever work is available. Warning: part-time, seasonal or short-duration relationships have nothing to do with independent contractor status.

## 7. Control their own assistants

Contractors shouldn't hire, supervise or pay assistants at the direction of the hiring company. If assistants are hired, it should be at the contractor's sole discretion.

## 8. Time to pursue other work

Contractors should have enough time available to pursue other gainful work.

## 9. Decide on job location

Contractors control where they work. If they work on the premises of the hiring company, it is not under that company's direction or supervision.

## 10. Order of work set

Contractors determine the order and sequence that they will perform their work.

## 11. No interim reports

Contractors are hired for the final result and therefore should not be asked for progress or interim reports.

## 12. Paid by job

Contractors are paid by the job, not by time. Payment by the job can include periodic payments based on a percentage of job completed. Payment can be based on the number of hours needed to do the job times a fixed hourly rate. However, this should be determined before the job begins.

## 13. Work for multiple firms

Contractors often work for more than one firm at a time.

## 14. Pay business expenses

Contractors generally are responsible for their incidental expenses.

## 15. Have own tools

Contractors usually furnish their own tools. Some hiring firms have leased equipment to their independent contractors so they could show the contractor had their own tools and an investment in their business (see #16). This strategy won't work if the lease is for a

nominal amount or can be canceled by the hiring firm at will. In short, the lease must be equivalent to what an independent businessperson could have obtained in the open market. For more information, contact a labor attorney.

## 16. Significant investment in their business

Contractors should be able to perform their services without the hiring company's facilities (equipment, office furniture, machinery, etc.). The contractor's investment in his trade must be real, essential and adequate. (Please see #15 above)

## 17. Offer services to general public

Contractors make their services available to the general public by one or more of the following:

- Having an office and assistants
- Having business signs
- Having a business license
- Listing their services in a business directory
- Advertising their services

## 18. Can make entrepreneurial profit or loss

Contractors should be able to make a profit or a loss. Employees can't suffer a loss. Five circumstances show that a profit or loss is possible:

- If the contractor hires, directs and pays assistants
- If the contractor has his own office, equipment, materials or facilities
- The contractor has continuing and recurring liabilities
- If the contractor has agreed to perform specific jobs for prices agreed upon in advance
- If the contractor's services affect his own business reputation

## 19. Can't be fired at will

Contractors can't be fired as long as they produce a result which meets the contract specifications.

## 20. No compensation for non-completion

Contractors are responsible for the satisfactory completion of a job or they may be legally obligated to compensate the hiring firm for failure to complete.

