Bowles Rice

Attorneys at Law

Legal Update, Vendor Contracts, COVID Leave and Independent Contractors

WVASBO FALL CONFERENCE

Cabell County Board of Education
Transportation Complex

**Attorneys Josh Cottle, Kim Croyle,
Trey Morrone and Howard E. Seufer, Jr.**

October 22, 2021

Bowles Rice

Attorneys at Law

THE LEADERS OF OUR EDUCATION LAW PRACTICE

Rick Boothby, Parkersburg
Office: (304) 420-5535
Cell: (740) 236-8778
rboothby@bowlesrice.com

Kayla Cook, Morgantown
Office: (304) 285-2565
Cell: (304) 282-9363
kcook@bowlesrice.com

Josh Cottle, Charleston
Office: (304) 347-2116
Cell: (304) 640-3036
jcottle@bowlesrice.com

Kim Croyle, Morgantown
Office: (304) 285-2504
Cell: (304) 319-4745
kcroyle@bowlesrice.com

Roger Hunter, Charleston
Office: (304) 347-1101
Cell: (304) 993-6044
rhunter@bowlesrice.com

Julie Moore, Morgantown
Office: (304) 285-2524
Cell: (304) 313-2740
jamoore@bowlesrice.com

Trey Morrone, Charleston
Office: (304) 347-1777
Cell: (304) 690-0784
tmorrone@bowlesrice.com

Howard Seufer, Charleston
Office: (304) 347-1776
Cell (304) 767-1804
hseufer@bowlesrice.com

Leigh Anne Wilson,
Morgantown
Office: (304) 554-2603
Cell: (304) 906-9131
lwilson@bowlesrice.com

EDUCATION PRACTICE GROUP STAFF

Sarah Simpson Plantz
Charleston, (304) 347-1183
splantz@bowlesrice.com

Linda Poff
Parkersburg, (304) 420-5508
lpoff@bowlesrice.com

Cricket Reynolds
Charleston, (304) 347-1778
creynolds@bowlesrice.com

OTHER BOWLES RICE ATTORNEYS PROVIDING SUPPORT TO PUBLIC EDUCATION CLIENTS IN SPECIFIC AREAS

(Contact Information may be found at www.bowlesrice.com or by calling (304) 347-1100)

Mark Adkins – Construction litigation

Bob Bays – Real estate condemnations

Aaron Boone –Litigation on behalf of school boards

Michael Cardi – Title IX investigations and compliance

Mark D'Antoni – Acquisition and disposition of real estate

Jennifer Hagedorn – Workers compensation & unemployment claims

Roger Hanshaw - Parliamentary procedure, education services cooperatives

Ashley Hardesty O'Dell –Litigation on behalf of school boards

Bob Kent –Litigation on behalf of school boards & defending human rights commission claims

Robert Kiss – Commercial matters & local property tax abatements (PILOTs)

Marc Monteleone – Construction agreements & claims

Tom Pearcy – Bond issues, excess levies, lease-purchase & energy savings contracts

Chazz Printz – Litigation for school boards

Kin Sayre – Interactions with local governments

Julie Shank - Cybersecurity

Ken Webb – Construction agreements & claims Litigation

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TABLE OF CONTENTS

Page

LEGAL UPDATE

Highlights of Legislation Enacted at the 2021 Regular Session Affecting Public Education in West Virginia 1

Recent Decisions of the West Virginia Supreme Court of Appeals 32

Recent Decisions of the West Virginia Public Employees Grievance Board 33

Recent Advisory Opinion from the West Virginia Ethics Commission. 35

VENDOR CONTRACTS

Appendix C to Policy 1224.1 (Authorized and Unauthorized Expenditures) 36

Appendix C to Policy 8200 (Agreement Addendum) 38

Top 10 Issues for Contract Review 41

EMPLOYEE OR INDEPENDENT CONTRACTOR?

W. Va. Code §21-5I-4. Classification of independent contractors and employees 43

Internal Revenue Service Rev. Ruling 87-41 46

IRS Form SS-8. Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding 54

W. Va. Code §18-1-1. Definitions 58

W. Va. Code §18A-1-1. Definitions 60

Cunningham v. Herbert J. Thomas Memorial Hospital Assn (230 W. Va. 242, 737 S.E. 2d 270) (2012) 63

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HIGHLIGHTS OF LEGISLATION AFFECTING PUBLIC EDUCATION IN WEST VIRGINIA ENACTED AT THE 2021 REGULAR SESSION

By the Education Law Group at Bowles Rice LLP

Senate Bill 11
Declaring work stoppage or strike by public employees to be unlawful
In effect June 2, 2021
Read the Entire Bill

The Legislature finds that any work stoppage or strike by county board of education employees is unlawful and deemed a serious disruption of children's state constitutional right to a thorough and efficient system of free schools. *West Virginia Code § 18-5-45a(a).*

Under Senate Bill 11, a county board employee is considered to be participating in a concerted work stoppage or strike if, on any day during a concerted work stoppage or interruption of operations by the board's employees, the employee

- Does not report to work as required by their contract.
- Is not on leave "as specifically permitted" by any West Virginia Code provision.
- Is not otherwise prevented from reporting to work based on circumstances that the county superintendent determines are beyond the employee's control and unrelated to their participation in the ongoing stoppage or strike.

West Virginia Code § 18-5-45a(b).

Participation in a concerted work stoppage or strike is a ground for terminating an employee's contract. If not discharged, the employee must forfeit their prorated pay for each day they participated in the stoppage or strike. *West Virginia Code § 18-5-45a(c).*

The Legislature also declares that it never intended that when school is closed for a concerted work stoppage or strike, county boards may use flexibilities of the school calendar statute (West Virginia Code § 18-5-45) to reduce either the 180-day instructional term for students or the 200-day employment term for personnel. Accordingly, Senate Bill 11 forbids using accrued and equivalent instructional time and the delivery of instruction through alternative methods to cancel days lost due to concerted work stoppages and strikes. *West Virginia Code § 18-5-45a(a); West Virginia Code § 18-5-45a(d).*

Senate Bill 14
Providing for additional options for alternative certification for teachers
In effect May 27, 2021
Read the Entire Bill

Subject to State Board of Education rules, the State Superintendent is authorized to issue a public school professional teaching certificate to a person who

- Holds a bachelor's degree from an accredited college or university.
- Submits to a criminal history check, the results of which may form the basis for the denial of a certificate for just cause.
- Successfully completes pedagogical training or coursework aligned with standards that are nationally recognized or established by the State Board.
- Passes the same subject matter and competency test or tests required by the State Board for traditional applicants for licensure.

West Virginia Code § 18A-3-2a(a)(1)(C).

Under the statute, the new certificate is to be treated as the equivalent of certificates granted to graduates of teacher preparation programs at public higher education institutions. *West Virginia Code § 18A-3-2a(a)(4).*

Senate Bill 89
Exempting certain kindergarten and preschool programs offered by private schools from registration requirements
In effect July 7, 2021
Read the Entire Bill

Public school kindergarten, preschool and school education programs are already excused by law from having to obtain child-care center licenses from the State Department of Health and Human Services. The same exemption now applies to kindergarten, preschool and school education programs operated by private, parochial or church schools recognized by the State Department of Education, and to school education programs operated by federal Head Start Program grantees. However, in accordance with federal requirements, the Head Start programs must continue to perform criminal background checks on all employees. *West Virginia Code § 49-2-113(c)(9); West Virginia Code § 49-2-113(c)(9).*

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Senate Bill 272
Relating to the WV Employment Law Worker Classification Act
In effect June 9, 2021
Read the Entire Bill

To resolve uncertainty about the correct classification of workers as independent contractors or employees, Senate Bill 272 enacts the West Virginia Employment Law Worker Classification Act. The Act contains standards that are to be used in determining who is an employee and who is an independent contractor for purposes of West Virginia's workers' compensation laws, unemployment compensation laws, Human Rights Act, and Wage Payment and Collection Act. The Act supersedes, to the extent necessary, all laws in those areas that are contingent on the classification of a worker as an employee. *West Virginia Code § 21-5I-2; West Virginia Code § 21-5I-3.*

For those purposes, a worker engaged by a county board of education must be classified as an independent contractor if they meet all four of these conditions:

- In compliance with the Act, the worker signs a written contract stating the principal's intention to engage them as an independent contractor and acknowledging that the worker understands that (a) they are providing services as an independent contractor; (b) the principal will not treat them as an employee; (c) the principal will not provide them with workers' compensation and unemployment compensation benefits; and (d) they will be responsible for the majority of supplies and other variable expenses that they incur in performing the contracted service, except for expenses that are for travel and expenses that are reimbursed under an express provision of the contract, and except for supplies and expenses that are commonly reimbursed under industry practice. *West Virginia Code § 21-5I-4(a)(1).*

- For fees earned from the work, the worker has filed or is contractually required to file, appropriate business or self-employment income tax returns. *West Virginia Code § 21-5I-4(a)(2).*

- Even though the worker may not have control over the final result of the work, they actually and directly control the manner and means by which the work is to be accomplished, except for the exercise of control necessary to comply with government and regulatory requirements, protect persons or property, protect a franchise brand, or deploy, implement or use any safety improvement required by contract or otherwise. This condition is satisfied, even though the principal may provide orientation, information, guidance, or suggestions about the principal's products, business, services, customers and operating systems, and training otherwise required by law. *West Virginia Code § 21-5I-4(a)(3).*

- The worker satisfies three or more of nine criteria listed in the statute, such as control over the amount of time personally spent providing services, freedom to hire or contract with

others to perform all or some of the work, the right to work for other principals, and no obligation to perform additional services for the principal without a new or modified contract. *West Virginia Code § 21-51-4(a)(4).*

For purposes of West Virginia's workers' compensation laws, unemployment compensation laws, Human Rights Act, and Wage Payment and Collection Act, workers who do not meet all four conditions to be classified as an independent contractor are not automatically to be classified as employees. Instead, they must be classified as employees or independent contractors based on a test set forth in Internal Revenue Service ruling 87-41. *West Virginia Code § 21-51-4(b).*

An important limitation is that Senate Bill 272's test for determining whether a worker is an independent contractor or an employee does not govern such determinations in areas of West Virginia law outside of the workers' compensation laws, unemployment compensation laws, Human Rights Act, and Wage Payment and Collection Act. For example, the Act does not apply in determining principal-agent status for purposes of vicarious liability to a third party in tort. *West Virginia Code § 21-51-5.*

Senate Bill 275
Relating generally to WV Appellate Reorganization Act of 2021
In effect June 30, 2021
Read the Entire Bill

Senate Bill 275 creates a three-judge Intermediate Court of Appeals for West Virginia which will have appellate jurisdiction over

- Final judgements or orders of a circuit court in civil cases, entered after June 30, 2022.

- Final judgments or orders of a family court entered after June 30, 2022.

- Final judgments or orders of a circuit court concerning guardianship or conservatorship matters, entered after June 30, 2022.

- Final judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County under the State Administrative Procedures Act or any other provision of State Code, including decisions of the West Virginia Public Employees Grievance Board.

- Certain final orders or decisions of the Health Care Authority issued prior to June 30, 2022, in a certificate of need review.

- Certain final orders or decisions issued by the workers compensation Office of Judges after June 30, 2022.

- Final orders or decisions of the Workers Compensation Board of Review entered after June 30, 2022.

The new court will not have appellate jurisdiction over

- Judgments or final orders issued in any criminal proceeding in this state unless the West Virginia Supreme Court of Appeals should adopt a policy of discretionary review of criminal appeals.
- Judgments or final orders issued in any juvenile proceeding.
- Judgments or final orders issued in child abuse and neglect proceedings.
- Orders of commitment.
- Any proceedings of the Lawyer Disciplinary Board.
- Any proceedings of the Judicial Investigation Commission.
- Final decisions of the Public Service Commission.
- Interlocutory appeals.
- Certified questions of law.
- Extraordinary remedies, and any appeal of a decision or order of another court regarding an extraordinary remedy.

West Virginia Code § 55-11-4.

Senate Bill 277
Creating COVID-19 Jobs Protection Act
In effect from passage, March 11, 2021
Read the Entire Bill

With exceptions, the COVID-19 Jobs Protection Act protects county boards of education against claims for loss, damage, physical injury or death arising from COVID-19. The Act applies retroactively from January 1, 2020 and applies to any cause of action accruing on or after that date. *West Virginia Code § 55-19-1; West Virginia Code § 55-19-4; West Virginia Code § 55-19-9(a).*

The exceptions include some workers compensation claims for work-related injury, disease or death caused by or arising from COVID-19 in the course of and resulting from employment by a county board of education. An exception is also made in the case of any person, employee or agent who engaged in intentional conduct with actual malice. *West Virginia Code § 55-19-6; West Virginia Code § 55-19-7.*

Senate Bill 356
Allowing for written part of drivers' exam given in high school drivers' education course
In effect June 24, 2021
Read the Entire Bill

By September 1, 2021, the Commissioner of the State Division of Motor Vehicles must propose emergency rules and rules for legislative approval to allow State Department of Education-sanctioned driver education instructors to administer a knowledge test developed by the Division of Motor Vehicles. Any person successfully completing the administered test is exempt from proof of school enrollment that is otherwise required by West Virginia Code § 18-8-11 for persons under the age of 18 who have not yet graduated from high school. *West Virginia Code § 17B-2-7(b).*

Senate Bill 375
Relating to county boards of education policies for open enrollment
In effect July 6, 2021
Read the Entire Bill

Legislation enacted in 2019 required each county board of education to adopt a policy allowing nonresident students to enroll in any school within the district without any charge for tuition and without obtaining approval from the board of the county in which the student resides. Senate Bill 375 removes a requirement that the policy also articulates any admission criteria, transportation provisions, timelines for open enrollment periods, and restrictions on transfers due to building capacity constraints. *West Virginia Code § 18-5-16(c).*

Also, under the bill, an application to transfer into a school district may now be denied by a county board for only two reasons: lack of grade level capacity or the nonresident student's failure to correctly fill out or submit the application form. All denials must be in writing and sent to the parent or guardian and State Department of Education within three business days of the decision. Every denial must include the reason and explanation for the denial, plus information on appealing the decision to the State Superintendent of Schools. *West Virginia Code § 18-5-16(c)(4).*

The bill further provides that the county board to which a student wishes to transfer may not refuse the transfer by virtue of the student transferring from a private, parochial, church, or religious school that holds an exemption under West Virginia Code § 18-8-1(k) from the compulsory school attendance requirement. However, the legislation states that this provision shall not be construed to allow a county board to give an enrollment preference to such students. *West Virginia Code § 18-5-16(c)(1)(F).*

Finally, the statute's funding provisions are amended to address situations where a student transfers after the school year has begun.

- If the transfer occurs after the second month of the school year, the receiving county may, in the next fiscal year, invoice the student's former county for a pro rata share of the amount the receiving county otherwise would have received under the state basic foundation program had the student been included in its prior year's net enrollment. *West Virginia Code § 18-5-16(e)(1).*

- If a student in grades K-12 transfers after the second month, the receiving county may, in the next fiscal year, invoice the student's former county for the amount the receiving county otherwise would have received under aid to exceptional students had the student been included in the county's prior child count enrollment. *West Virginia Code § 18-5-16(e)(2).*

- If a student in Pre-K transfers after the child count of exceptional students is certified for the school year, the receiving county may, in the next fiscal year, invoice the student's former county for the amount the receiving county otherwise would have received under aid to exceptional students had the student been included in the county's prior year's child count enrollment. *West Virginia Code § 18-5-16(e)(3).*

Senate Bill 398
Limiting eligibility of certain employers to participate in PEIA plans
In effect April 10, 2021
Read the Entire Bill

A public charter school will be eligible to participate in the Public Employees Insurance Program if the school is a 501(c)(3) tax exempt entity and its charter contract states that the school will participate. In that case, only employees directly employed by the school may be covered. *West Virginia Code § 5-16-29.*

Senate Bill 431
Relating to school attendance notification requirements to DMV
In effect June 24, 2021
Read the Entire Bill

In lieu of a written notice or form, the Division of Motor Vehicles may now accept electronic notice from a county board of education that a student under the age of 18 who applies for an instruction permit or operator's license is properly enrolled in school and making satisfactory progress. *West Virginia Code § 18-8-11(b).*

Senate Bill 435
Requiring county superintendents to authorize certain school principals or administrators at nonpublic schools to issue work permits for enrolled students
In effect June 24, 2021
Read the Entire Bill

This legislation modifies laws under which county superintendents of schools and their designees issue work permits for the employment of 14- and 15-year-old county residents in any gainful operation. Work permits can now also be issued by persons who administer public, private or home school secondary education programs and who are also authorized to issue diplomas or other appropriate credentials to persons who have completed those programs. The State Commissioner of Labor must make printed forms for work permits available to all such persons. *West Virginia Code § 21-6-3(a); West Virginia Code § 21-6-4(b).*

Applicants for work permits for homeschooled students are no longer put in the position of having to produce a certificate signed by the principal of a school the child attends; no such certificate or counterpart is required. As for the other documents that applicants for work permits must submit, issuers of permits must still review the documents, but are no longer required to keep them on record. Senate Bill 435 also removes a requirement that the child must appear before the person issuing the work permit. *West Virginia Code § 21-6-3(b); West Virginia Code § 21-6-4(a).*

Senate Bill 636
Requiring certain history and civic courses be taught in schools
In effect July 9, 2021
Read the Entire Bill

An existing statute requires all West Virginia public, private, parochial and denominational schools to give at least one year of instruction, prior to the completion of eighth grade, in the history of the state. The statute also requires those schools to require courses by the completion of twelfth grade in United States history, civics, the Constitution of the United States and the government of West Virginia. *West Virginia Code § 18-2-9.*

Senate Bill 636 now specifies that those required courses must

- Include instruction on the institutions and structure of American government, such as the separation of powers, the Electoral College, and federalism.

- Include instruction that provides students an understanding of American political philosophy and history, utilizing writings from prominent figures in Western civilization, such as Aristotle, Thomas Hobbes, John Locke, and Thomas Jefferson.

- Offer an objective and critical analysis of ideologies throughout history including, but not limited to, capitalism, republicanism, democracy, socialism, communism, and fascism.

- Emphasize the use of primary sources and interactive learning techniques, such as mock scenarios, debates, and open and impartial discussions.

West Virginia Code § 18-2-9(a)(1).

The State Board of Education, "in consultation with other entities," is to prescribe the basic requirements of those courses for middle and high school, including the academic standards, and publish an approved list of instructional resources. The bill states that the "other entities" for consultation may include such organizations as the Florida Joint Center for Citizenship, the College Board, the Bill of Rights Institute, Hillsdale College, the Gilder Lehrman Institute of American History, the Constitutional Sources Project, educators, school administrators, post-secondary education representatives, elected officials, business and industry leaders, parents, and the public. *West Virginia Code § 18-2-9(a)(2).*

The State Board must also provide testing or assessment instruments for the history and civics courses of instruction, which must be mandatory for students enrolled in the courses. *West Virginia Code § 18-2-9(a)(3).*

Senate Bill 636 also supplements the provision of Code covering social studies instruction during Celebrate Freedom Week. The required in-depth study of the United States Constitution must now emphasize amendments that the Legislature deems crucial to the survival of democracy and freedom, such as the Bill of Rights and the Thirteenth, Fourteenth, Fifteenth and Nineteenth amendments. *West Virginia Code § 18-2-9(e)(1).*

Senate Bill 651
Allowing county boards of education to publish financial statements on website
In effect July 6, 2021
Read the Entire Bill

For financial statements for the fiscal year beginning July 1, 2023, the Legislature made the following changes. *West Virginia Code § 18-9-3a(h)*

County boards of education will have 120 days after the end of a fiscal year, instead of 90 days, to prepare and publish the financial statement for that year on the form prescribed by the State Auditor and State Superintendent of Schools. However, another provision of Senate Bill 651 requires boards to prepare their financial statements and file them with the State Auditor and State Superintendent no later than 90 days after the end of the fiscal year. *West Virginia Code § 18-9-3a(a); West Virginia Code § 18-9-3a(f).*

Boards will have the choice as of July 1, 2023, of publishing their financial statements either as Class I-0 legal advertisements or on their websites. However, prior to publishing its financial statement on its website for the first time, a county board must (1) hold a public hearing at which interested persons may express their views on whether the statement should be published as a Class I-0 legal ad or on the website, and (2) give public notice of the availability of the website posting, publishing this notice once a week in a qualified newspaper of general circulation for two successive weeks. *West Virginia Code § 18-9-3a(b).*

If posted as a Class I-0 legal advertisement, the financial statement must not include the name of any person who has entered into a contract with the county board as a regular or substitute teacher or service employee. *West Virginia Code § 18-9-3a(c).*

If posted on a board's website, the financial statement must remain posted there at least until publication of the next annual statement, and it must include

- The name of every regular and substitute teacher and service employee who has entered into a contract with the board, with the amounts paid to each.
- Budget estimates.
- A list of the names of each firm, corporation and person who received less than $250 from any fund during the fiscal year, showing the amount paid to each and the purpose of the payment.

West Virginia Code § 18-9-3(d).

Lastly, when a board transmits, as it must, a copy of the financial statement to any county resident requesting a copy, the information that must accompany the copy will now include a list of each firm, corporation and person who received less than $250 from any fund during the fiscal year, showing the amount paid to each and the purpose of the payment. Until this change takes effect for financial statements for the fiscal year beginning July 1, 2023, the supplemental information must name parties who received less than $500. *West Virginia Code § 18-9-3(g).*

Senate Bill 673
Relating to venue for bringing civil action or arbitration proceedings under construction contracts
In effect July 1, 2021
Read the Entire Bill

When a county board of education or other party whose principal place of business is in West Virginia enters into a construction contract on or after July 1, 2021, the construction contract must provide that any civil action or arbitration required or permitted by the contract must be initiated

and heard in West Virginia. Any contrary provision of a construction contract entered into on or after July 1, 2021, will be unenforceable. *West Virginia Code § 56-1-1b(b).*

For purposes of the new law, "construction contract" means a contract, subcontract, or agreement entered into or made by an owner, architect, engineer, contractor, construction manager, subcontractor, supplier, or material or equipment lessor for the design, construction, alteration, demolition, renovation, remodeling, or repair of, or for the furnishing of material or equipment for a building, structure, appurtenance, or other improvement to or on public or private real property, including moving, demolition, and excavation connected with the real property. The term also includes an agreement to which an architect, engineer, or contractor and an owner's lender are parties regarding an assignment of the construction contract or other modifications. *West Virginia Code § 56-1-1b(a).*

Senate Bill 680
Allowing State Superintendent of Schools define classroom teachers certified in special education
In effect July 5, 2021
Read the Entire Bill

Under legislation enacted in 2019, the state minimum salary schedule for teachers was amended to credit three additional years of experience to "each classroom teacher certified in special education and employed as a full-time special education teacher." The questions have since arisen whether speech-language pathologists are to be considered classroom teachers for purposes of this salary enhancement. The State Department of Education has advised that they are not. The State Public Employees Grievance Board has ruled that they are.

With the apparent intent of resolving the question, Senate Bill 680 provides that the meaning of "each classroom teacher certified in special education and employed as a full-time special education teacher" shall be determined by the State Superintendent of Schools. *West Virginia Code § 18A-4-2(e).*

House Bill 2001
Relating generally to creating the West Virginia Jumpstart Savings Program
In effect June 19, 2021
Read the Entire Bill

The West Virginia Jumpstart Savings Act is a savings and investment program to assist West Virginia citizens who wish to embark on a new trade or establish a new business in the state. It recognizes the importance of cultivating an environment where tradespersons and entrepreneurs can be successful in their careers and remain in their home state. *West Virginia Code § 18-30A-2.*

The Act establishes a Jumpstart Savings Program that will be operable on or before July 1, 2022 and administered by the seven-member Jumpstart Savings Board that includes the State Treasurer

and the State Superintendent of Schools. The board will implement the program through financial organizations serving as account depositories and managers. The Treasurer will develop marketing plans and promotional material to ensure that potential beneficiaries will be aware of and take advantage of the program. *West Virginia Code § 18-30A-4; West Virginia Code § 18-30A-5; West Virginia Code § 18-30A-6; West Virginia Code § 18-30A-7.*

Under the Act, with an initial deposit of at least $25, people may open and invest money into a Jumpstart Savings Account for the benefit of a single named person as the designated beneficiary. The Treasurer will deposit $100 into a newly opened account if the designated beneficiary is a West Virginia resident, but only if the beneficiary is either under 18 years of age or has, within the previous 180 days, enrolled in an approved apprenticeship or educational program. Once a Jumpstart Savings Account is opened, any person may contribute, subject to applicable state and federal laws. The Jumpstart Program will manage and invest funds in all the accounts and funds received from any other sources. West Virginia Code § 18-30A-3(1); West Virginia Code § 18-30A-3(2); *West Virginia Code § 18-30A-8; West Virginia Code § 18-30A-10.*

A beneficiary may receive distributions from the account for these qualified expenses set out in the Act:

- The purchase of tools, equipment, or supplies to be used exclusively in an occupation or profession for which the beneficiary is required to complete an apprenticeship program, earn a license or certification from an Advanced Career Education (ACE) career center, or earn an associate degree or certification from a community and technical college.

- Fees for required certification or licensure to practice any such trade or occupation in this state.

- Costs incurred by the beneficiary that are necessary for the purpose of establishing and operating in West Virginia a business in which the beneficiary will practice any such occupation or profession.

West Virginia Code § 18-30A-11.

The Act gives favorable West Virginia income tax treatment to up to $25,000 per year in qualifying Jumpstart Savings Account contributions, distributions and employer matching contributions. *West Virginia Code § 11-21-12m; West Virginia Code § 11-21-25; West Virginia Code § 11-21-12m; West Virginia Code § 11-24-10a; West Virginia Code § 18-30A-12.*

House Bill 2008
Amending requirements for licensure relating to elevator mechanics, crane operators, HVAC, electricians and plumbers
In effect June 16, 2021
Read the Entire Bill

"Plumber II" is among the official class titles assigned to service personnel employed by county boards of education. The title is defined in West Virginia Code § 18A-4-8(i) as a person employed as a journeyman plumber. The term "journeyman plumber" is not further defined in the school statutes. However, with certain exceptions that appear not to apply to plumber-employees of county boards, in order to perform plumbing work in our state, an individual must have a license issued by the State Commissioner of Labor. *West Virginia Code § 21-14-3.*

House Bill 2008 modifies the qualifications for licensure as a journeyman plumber. Instead of having at least 8,000 hours of plumbing or related experience, an applicant now must pass a journeyman plumber written exam with a score of at least 70 percent. As before, they must also be competent to instruct and supervise the work of a plumber in training, meaning a person who has not passed the journeyman exam. *West Virginia Code § 21-14-2(b).*

"Electrician II" is another of the official class titles for service personnel employed by county boards of education, defined in West Virginia Code § 18A-4-8(i) as a person employed as an electrician journeyman or one who holds a journeyman electrician license issued by the State Fire Marshall. Although House Bill 2008 does not modify the qualifications an individual must have to qualify for the journeyman's license, the bill now makes it mandatory, rather than optional, for the Fire Marshall to issue the license, without written examination, to a person holding the same or equivalent license from another jurisdiction if they are in good standing with all other jurisdictions where they are licensed and if they demonstrate that they can work safely and competently. *West Virginia Code § 29-3B-4(d).*

House Bill 2009
Relating to limitations on the use of wages and agency shop fees by employers and labor organizations for political activities
In effect June 17, 2021
Read the Entire Bill

House Bill 2009 prohibits the deduction or assignment of union, labor organization or club dues or fees from the earnings of county board of education employees. *West Virginia Code § 18A-4-9(6); West Virginia Code § 21-5-1(g),*

As for wage assignments for permissible purposes, the bill also removes the requirement that assignments of an employee's future wages must be notarized. It will now be sufficient if the assignment is in writing. *West Virginia Code § 21-5-3(e).*

House Bill 2012
Relating to public charter schools
In effect June 1, 2021
Read the Entire Bill

House Bill 2012 extensively amends the 2019 public charter school legislation. It begins by increasing to ten (from three), both the total number of public charter schools that may be operational before July 1, 2023, and the cap on public charter schools that may become operational every three years thereafter. The bill also provides that two years after the first public charter school begins operations, the Legislative Auditor must conduct an audit of the public charter school program and make a report to the Legislative Oversight Commission on Education Accountability. *West Virginia Code § 18-5G-1(g); West Virginia Code § 18-5G-1(h).*

LEA Status

Previously, the statute provided that the school district in which a charter public school is located remained the local education agency (LEA) for public charter schools in the county. A public charter school was to be treated as an LEA only for purposes of applying for competitive federal grants. Now, each public charter school must be treated as its own LEA "for all purposes" except as needed under the West Virginia Public School Support Plan for funding purposes. *West Virginia Code § 18-5G-5(c).*

Multiple Authorizers

Under the 2019 legislation, two or more county boards of education serve as authorizers of a public charter school whose primary recruitment area encompasses territory in those counties. House Bill 2012 now requires that in such cases, the county boards must act together as a single authorizer in all respects. If, functioning together, the boards reject the public charter school application, one or more of the individual county boards may approve the application, in which case the school must be located in one of the counties that was approved. *West Virginia Code § 18-5G-2(2)(B).*

The Professional Charter School Board

House Bill 2012 designates the new West Virginia Professional Charter School Board as an authorizer of public charter schools, including virtual public charter schools (below). The Professional Charter School Board reports and is responsible to the State Board of Education. Its mission is "to authorize high-quality public charter schools throughout the state that provide more options for students to attain a thorough and efficient education, particularly through schools designed to expand the opportunities for at-risk students." The Governor appoints the Professional Charter School Board's five voting members, with the advice and consent of the State Senate. The chairs of the House and Senate Committees on Education serve as ex officio members. The Professional Charter School Board may appoint an executive director and employ staff. *West*

Virginia Code § 18-5G-2(2)(C); West Virginia Code § 18-5G-15(a); West Virginia Code § 18-5G-15(b); West Virginia Code § 18-5G-15(i).

The Professional Charter School Board must investigate complaints alleging impairments in the quality of education in the charter schools it authorizes, or alleging that those schools violated laws or policy. It may order and take corrective actions or exercise sanctions in response to serious impairments. *West Virginia Code § 18-5G-15(k).*

Applications to Establish Public Charter Schools

The deadline for applying to establish a public charter school is now set as August 31 of the year "prior to the beginning of operations for the proposed school year." No school may begin to operate before the beginning of the "proposed school year following the previous year August application." *West Virginia Code § 18-5G-4(b)(1).*

If an application is denied, the applicant may appeal within 30 days to the State Board of Education, which is required to establish a rule governing the appeal process. The State Board is required to remand the denial decision back to the authorizer for further proceedings if the State Board finds that the substantive rights of the authorizer have been prejudiced because the authorizer's action violated the constitution, statute or State Board policy; exceeded the authorizer's authority or jurisdiction; was based on unlawful procedures; was affected by other error of law; was clearly wrong in view of the evidence; or arbitrary, capricious or an abuse of discretion. *West Virginia Code § 18-5G-13(a); West Virginia Code § 18-5G-13(b); West Virginia Code § 18-5G-13(c).*

Charter Contracts

House Bill 2012 also amends the statute governing the charter contract that an authorizer and the governing board of a public charter school must enter into within 90 days after approval of a charter application. The legislation provides that the contract may incorporate and be consistent with the approved application or, alternatively, the parties may agree to make part or all of the charter application a part of the contract, along with other provisions that, by law, each charter contract must address. *West Virginia Code § 18-5G-9(a).*

The 2019 statute's requirement that a charter contract include provisions for revoking the charter contract are replaced with a requirement that the contract state the conditions under which the contract may be non-renewed. The conditions must cover the process by which a non-renewal may occur, including the amount of advance notice an authorizer must give the public charter school of the prospect that the contract may be non-renewed, the reasons for potential non-renewal, and the right to legal counsel at all interactions between the authorizer and the school's governing board. The charter contract must also afford the school's governing board a timeframe of not less than 60 days to respond to a proposed non-renewal. *West Virginia Code § 18-5G-9(d).*

Annual Reports

It is no longer optional for an authorizer to require each public charter school it oversees to submit an annual report to help the authorizer gather complete information about the school consistent with the requirements of the Act and the charter contract. Authorizers must require the annual reports. *West Virginia Code § 18-5G-6(h).*

Charter Non-Renewals

Under existing law, an authorizer is required to offer the public charter school guidance about making a renewal application. House Bill 2012 specifies that the guidance must issue no later than June 30 of the school year before the school's final year of operation under the charter contract. If the authorizer declines to renew the charter contract, an appeal lies to the State Board of Education, the same as in the case of an appeal from the denial of the initial charter application. *West Virginia Code § 18-5G-10(b); West Virginia Code § 18-5G-10(c)(4)(B); West Virginia Code § 18-5G-13(a).*

Charter Contract Revocations

Authorizers are still empowered to revoke charter contracts for the same reasons as under the 2019 bill, with two added grounds. One is that an administrator employed by, or member of, the school's governing board is convicted of fraud or misappropriation of funds. The other is the existence of "dire and chronic academic deficiencies." *West Virginia Code § 18-5G-10(h).*

Virtual Public Charter Schools

The legislation authorizes virtual public charter schools that, with some exceptions, are subject to the same requirements as other public charter schools. *West Virginia Code § 18-5G-14(a).*

One exception is that a virtual public charter student, to the extent the charter contract allows or requires instruction to occur outside of a school building, is not required to be physically present in a school building or classroom. Another exception is that, to the extent the program described in the charter contract is a "learn at your own pace" program, neither the school nor the student has to comply with the instructional term requirement applicable to public schools or any State Board of Education rule requiring a student to receive instruction for any set time. Yet another exception is that a virtual public charter school is exempt from any law or State Board rule that applies to the traditional delivery of instruction, e.g., laws about student monitoring and security, the maximum teacher-pupil ratios, physical education requirements, to the extent any of them conflict with the delivery of virtual instruction. *West Virginia Code § 18-5G-14(a)(7); West Virginia Code § 18-5G-14(a)(9); West Virginia Code § 18-5G-14(a)(10).*

The Professional Charter School Board is empowered to authorize two statewide virtual public charter schools. They do not count against the 10-school limits of the public charter school laws,

above, and must not enroll more than "five percent of the headcount enrollment" per year. A statewide virtual school's charter is for a term of five years and renewable for a term of five years. Funding is consistent with other public charter school funding. *West Virginia Code § 18-5G-14(a)(1); West Virginia Code § 18-5G-14(a)(3); West Virginia Code § 18-5G-14(a)(4).*

Each county board of education may authorize one virtual public charter school. Its students must be from an identified primary recruitment area that is identified in the charter application and does not overlap the primary recruitment area of an already-authorized virtual public charter school. Enrollment is limited to ten percent of a county's headcount enrollment. Here, too, a virtual school's charter is for a term of five years and renewable for a term of five years, and funding is consistent with other public charter school funding. *West Virginia Code § 18-5G-14(a)(2); West Virginia Code § 18-5G-14(a)(3); West Virginia Code § 18-5G-14(a)(4).*

Authorizers may establish special requirements for virtual charter schools enrolling students in grades six and below to ensure they are developmentally appropriate for students. *West Virginia Code § 18-5G-14(a)(14).*

When enrolling a student who may require special education services, the same obligations apply to a virtual public charter school as apply to all other public charter schools. Enrollment shall not be denied or delayed on the basis of a disability, and the charter school shall convene an Individualized Education Program (IEP) meeting after admission to ensure that the school develops an appropriate IEP in accordance with all of the requirements set forth in the Individuals with Disabilities Education Act. *West Virginia Code § 18-5G-14(a)(5).*

Virtual charter schools must require each student to complete a student orientation prior to completing any other instructional activity. Each school must also have a policy regarding failure to participate in instructional activities, which include online logins to curriculum or programs; offline activities; completed assignments; testing; face-to-face communications or meetings with school staff or service providers; telephone or video conferences with school staff or service providers; and other documented communication with staff or providers related to school curriculum or programs. *West Virginia Code § 18-5G-14(a)(11); West Virginia Code § 18-5G-14(a)(13)(A); West Virginia Code § 18-5G-14(a)(13)(B).*

The school's policy must include consequences for non-participation. One consequence must be disenrollment from the school (1) for failure by the student, after the parent or guardian receives a written report, to comply with the policy within a reasonable time, and (2) the student's failure, after other interventions contained in the policy, to consistently participate in instructional activities. A student who is disenrolled under the virtual charter school's policy shall be transferred to their school district of residence. They will be ineligible to enroll in a virtual charter school for one school year from the date of disenrollment. *West Virginia Code § 18-5G-14(a)(13)(B).*

Virtual public charter schools must provide, in a manner agreed to in the charter contract, data demonstrating student progress toward graduation, which accounts for specific characteristics of each student. *West Virginia Code § 18-5G-14(a)(12).*

Note: The requirements of House Bill 2012 for virtual public charter schools do not apply to blended or virtual instruction for students in non-charter public schools under West Virginia Code § 18-5F-1 et seq. *West Virginia Code § 18-5G-14(b).*

House Bill 2013
Relating to the Hope Scholarship Program
In effect June 15, 2021
Read the Entire Bill

The Hope Scholarship Act creates the Hope Scholarship Program, which is to be operational no later than July 1, 2022. The stated purpose of the Program is to help parents better meet the individual education needs of their children by providing them with an option to a full-time public school education. A child participating in the Hope Scholarship Program is exempt from the compulsory school attendance requirement that would otherwise apply. *West Virginia Code § 18-8-1(m); West Virginia Code § 18-31-1; West Virginia Code § 18-31-5; West Virginia Code § 18-31-8(e).*

Administration

The Program will be administered by the Hope Scholarship Board, the members of which include the State Superintendent of Schools. Upon request of the Board, the State Superintendent may provide staff to the Board. The Board is authorized to contract with private organizations to administer the Program, including private financial management firms. *West Virginia Code § 18-31-3(a); West Virginia Code § 18-31-3(a)(4); West Virginia Code § 18-31-3(e).*

Funding

For fiscal year 2023 and subsequent years, the Act contemplates that the Legislature will appropriate to the State Department of Education, and the State Department will transfer to the Hope Scholarship Board, funds for the Hope Scholarship Program in at least the greater of these two amounts:

- Two percent of net public school enrollment in West Virginia, adjusted for state aid purposes, multiplied by the prior year's statewide average net state aid allotted per pupil.

- The total number of eligible Hope Scholarship applications received by the Board, if available, multiplied by the prior year's statewide average net state aid allotted per pupil.

The appropriation so calculated will be reduced by unused accumulated amounts and appropriations from prior years. *West Virginia Code § 18-9A-25.*

Eligibility

To be eligible for the Hope Scholarship, a child must be a resident of West Virginia and be either

- Enrolled full-time and attending a West Virginia public elementary or secondary school program for at least 45 calendar days during an instructional term at the time of application for the scholarship, or

- Eligible at the time of application to enroll in a kindergarten program in the state.

However, if on July 1, 2024, the participation rate of the combined students in the Program and eligible students who have applied to participate in the program during the previous school year is less than five percent of the previous year's net public school enrollment adjusted for state aid purposes, then, beginning July 1, 2026, a child will be considered to be eligible for the Hope Scholarship if they are enrolled, eligible to enroll, or required to enroll in a kindergarten or a public elementary or secondary school program in West Virginia. *West Virginia Code § 18-31-2(5).*

A Hope Scholarship student who was previously qualified for the scholarship remains eligible to apply for annual renewal of the scholarship until the occurrence of one of the conditions described below under *Annual Deposits to Account. West Virginia Code § 18-31-8(a).*

Application and Approval

Beginning no later than March 1, 2022, the parent, guardian or custodian of an eligible student may apply for Hope Scholarship funds. The Board must approve an application if

- The application is submitted in accordance with the Board's rules.

- The student meets the eligibility requirements, above.

- The parent signs an agreement with the Board promising to provide an education for the student in at least the subjects of reading, language, math, science and social studies; to use the Hope Scholarship funds for qualifying expenses only; to comply with the Program's rules; and to afford the student opportunities for educational enrichment such as organized athletics, art, music or literature.

- The Board confirms with the State Department of Education that the student satisfies the eligibility requirements, above, regarding enrollment, attendance and/or eligibility to enroll in kindergarten or a public school elementary or secondary program.

Applications are confidential and not a public record subject to release under the state Freedom of Information Act. However, the school district in which a Hope Scholarship recipient was last enrolled must provide an education service provider with a complete copy of the student's school records in a manner that complies with the federal Family Education Rights and Privacy Act. *West Virginia Code § 18-31-5(d); West Virginia Code § 18-31-5(e); West Virginia Code § 18-31-12.*

Student's Education Account

After an eligible student is approved for the Hope Scholarship, the Board will deposit funds into a personal education savings account to be used to pay qualifying expenses for the child's education. The funds allocated to each child's account on a yearly basis will equal the prior year's statewide average net state aid share allotted per pupil based on net enrollment adjusted for state aid purposes, reduced as necessary to reflect certain administrative costs of the Program. Funds deposited in a student's account do not constitute taxable income to the parent or the student, except for those funds spent on transportation services. *West Virginia Code § 18-31-5(c); West Virginia Code § 18-31-6(b); West Virginia Code § 18-31-6(c); West Virginia Code § 18-31-6(e).*

Annual Deposits to Account

The Board will continue to annually deposit funds so calculated into the student's personal education savings account unless (1) a parent fails to renew the Hope Scholarship on an annual basis or withdraws from the Program; (2) the Board determines that the student is no longer eligible; (3) the Board suspends or revokes the student's participation in the Program for failure to comply with the Act's requirements; (4) the student successfully completes a secondary education program; or (5) the student reaches age 21. *West Virginia Code § 18-31-6(f).*

Qualifying *Expenses*

Funds deposited in a student's Hope Scholarship account may be used for only the following qualifying expenses to educate the student:

- Ongoing services from a public school district in combination with the child's individualized instructional program, including individual classes and extracurricular activities and programs.
- Tuition and fees at a participating private school that provides education to elementary and/or secondary students and has notified the Board of its intention to participate in the Program and comply with the Program's requirements.
- Tutoring services provided by a tutoring facility or an individual other than a member of the student's immediate family.

- Fees for nationally standardized assessments, advanced placement examinations, any examinations related to college or university admission, and tuition and/or fees for preparatory courses for the exams.
- Tuition and fees for programs of study or the curriculum of courses that lead to an industry-recognized credential that satisfies a workforce need.
- Tuition and fees for nonpublic online learning programs.
- Tuition and fees for alternative education programs.
- Fees for after-school or summer education programs.
- Educational services and therapies such as occupational, behavioral, physical, speech-language and audiology therapies.
- A complete course of study for a particular content area or grade level, including any required supplemental materials.
- Fees for transportation paid to a fee-for-service transportation provider for the student to travel to and from an education service provider.
- Any other qualified expenses as approved by the Board.

Any public school or district providing such services must receive the appropriate pro rata share of the student's Hope Scholarship funds based on the percentage of total instruction provided to the student by the school or district. The Act requires county boards of education to charge tuition to Hope Scholarship students who enroll for services in a public school, although the students must not be included in net enrollment for state aid funding purposes. *West Virginia Code § 18-31-7(a).*

Service Providers

The Board must implement a system for payment to participating schools or education service providers from each student's Hope Scholarship account. Hope Scholarship funds may not be shared with a parent or student in any manner. The Act contains requirements that education service providers must meet in order to be eligible to accept payments from a Hope Scholarship account. For example, a provider must agree not to refund, rebate or share Hope Scholarship funds with parents or students in any manner; must certify that the provider will not discriminate on the basis of race, color or ethnicity when making contracts; and must agree to perform a criminal background check for any employee who will have contact with a Program student. However, education service providers cannot be required to alter their creed, practices, admission policy or curriculum in order to accept eligible recipients who receive tuition or fees from a Hope Scholarship account. They must be given "maximum freedom to provide for the educational needs

of Hope Scholarship students without governmental control." *West Virginia Code § 18-31-8(f); West Virginia Code § 18-31-9(c); West Virginia Code § 18-31-11.*

Education service providers can be barred from continuing to receive payments if the Board determines that they intentionally and substantially "misused Hope Scholarship funds." *West Virginia Code § 18-31-10(d).*

Accountability

The Act contains a number of accountability provisions, both for the Board's performance and the students receiving the Hope Scholarship. They include, in the case of scholarship renewals, confirmation that students who choose to attend a participating private school continue to attend the school and, for students who choose an individualized education program, standards based on their performance on nationally normed achievement tests or a certified teacher's review and assessment of the students' academic work. *West Virginia Code § 18-31-8(a).*

Students with Disabilities

The Board is required to ensure that parents of students with a disability receive notice that the child's participation in the Program is a parental placement under the federal Individuals with Disabilities Education Act, together with an explanation of the rights that parentally placed students possess under that Act and other laws and regulations. *West Virginia Code § 18-31-9(a)(3).*

Legal Challenges

The Act states the Legislature's intent that if any part of the Act is challenged in court as violating the state or federal constitution, parents of eligible Hope Scholarship students should be deemed to have standing to be parties to the litigation and should be permitted by the court to intervene if they are not already parties. *West Virginia Code § 18-31-13.*

House Bill 2029
Relating to teacher preparation clinical experience programs
In effect July 9, 2021
Read the Entire Bill

This bill renames Teacher in Residence programs as Clinical Teacher of Record programs and renames the Teacher in Residence permit as the Clinical Teacher of Record permit. *West Virginia Code § 18A-3-1(e); West Virginia Code § 18A-3-2a.*

House Bill 2145
Relating to student aide class titles
In effect July 9, 2021
Read the Entire Bill

Four new class titles are established for service personnel:

- "Aide V (Special Education Assistant Teacher – Temporary Authorization)," meaning a person who does not possess minimum requirements for the Aide V permanent authorization but is enrolled in and pursuing requirements as prescribed by the State Board of Education. The employee is compensated at pay grade E.

- "Aide V (Special Education Assistant Teacher)," meaning a service person referred to in the Aide I classification who holds a high school diploma or a GED certificate and who has completed the requirements and experience to be prescribed by the State Board. The employee is compensated at pay grade F.

- "Aide VI (Behavioral Support Assistant Teacher – Temporary Authorization)," meaning a person who does not possess minimum requirements for the Aide VI permanent authorization but is enrolled in and pursuing the requirements as prescribed by the State Board. The employee is compensated at pay grade E.

- "Aide VI (Behavioral Support Assistant Teacher)," meaning a person who works with a student or students who have identified behavior difficulties, holds at least an Aide III classification, and has completed the requirements and experience to be prescribed by the State Board. The employee is compensated at pay grade F.

In the case of all four new class titles, no service person is entitled to the paygrade associated with the title unless they have been selected to fill a posted position which specifically requires the successful candidate to hold or be enrolled in and pursuing the requirements for the classification. In each case, the determination as to whether a position will be posted requiring the class title is "solely at the discretion of the county." *West Virginia Code § 18A-4-8(i); West Virginia Code § 18A-4-8a(a)(2).*

House Bill 2267
Establishing an optional bus operator in residence program for school districts
In effect July 7, 2021
Read the Entire Bill

Because recruiting and retaining bus operators, including substitute bus operators, is a substantial challenge for county boards of education, county boards are now permitted to establish locally

funded recruitment and training programs for prospective bus operators. Each program requires State Department of Education approval and may only be used if the county board is unable to maintain an adequate number of regular or substitute bus operators in its pool or is experiencing a shortage in adequately staffing its transportation program. *West Virginia Code § 18A-2-15(a); West Virginia Code § 18A-2-15(b)(1); West Virginia Code § 18A-2-15(b)(2).*

Approved programs must include requirements for trainees to pass a background check and drug screen. Programs must specify the amount of any stipend, reimbursement or other benefit to be paid to participants; any obligation of program completers to apply or become employed as a bus operator for a period of time; and any penalties for failure to complete the program or to comply with any post-program requirements. *West Virginia Code § 18A-2-15(a)(3); West Virginia Code § 18A-2-15(a)(4); West Virginia Code § 18A-2-15(a)(5).*

To successfully complete a program, a trainee must complete all requirements to become classified as a bus operator. However, completion does not entitle a participant to employment. Completers may attain employment only upon successful application for an open regular or substitute bus operator position. Nor does a trainee accrue any seniority for time spent in the training program. *West Virginia Code § 18A-2-15(c).*

House Bill 2290
Initiating a State Employment First Policy to facilitate integrated employment of disabled persons
In effect June 28, 2021
Read the Entire Bill

The Legislature enacted the Employment First Policy initiative to promote the expectation that individuals with intellectual, developmental and other disabilities are valued members of the workforce who can often meet the same employment standards, responsibilities and expectations as other working-age adults when provided proper education, reasonable accommodations and supports. *West Virginia Code § 18-10Q-1.*

The policy's goal is to use publicly funded services to promote employment opportunities for citizens with disabilities in

- Competitive employment (work for which an individual with disabilities is compensated at a rate not less than minimum wage and for which the employee is eligible for the same level of benefits and opportunities for advancement as employees who are not individuals with disabilities).

- Integrated employment (at a location where the percentage of employees with disabilities relative to those without disabilities is consistent with the norms of the general workforce and where employees with disabilities interact with other persons to the same extent as employees without disabilities in comparable positions).

- Customized employment (with support and services that are designed to personalize the employment relationship between the person with a disability and employer in a way that meets the needs of both).

West Virginia Code § 18-10Q-1; West Virginia Code § 18-10Q-2.

An Employment First Taskforce, whose members include a representative of the State Department of Education, will meet at least four times a year through the end of 2025. The taskforce will develop and implement a plan to ensure, among other things, that

- Individuals, particularly secondary and post-secondary students with disabilities, understand the importance of, and are given the opportunity to explore, options for further training as a pathway to integrated employment.

- The staff of public schools, vocational service programs and community providers are trained and supported to assist in achieving the goal of competitive integrated employment for all individuals with disabilities.

Additionally, the State Department of Education will join other state agencies in adopting and implementing a State Employment First Policy that recognizes that earning a wage through competitive employment in a general workforce is the first and preferred outcome of all publicly funded services provided to working-age individuals with disabilities. *West Virginia Code § 18-10Q-3; West Virginia Code § 18-10Q-4.*

House Bill 2529
Prohibiting West Virginia institutions of higher education from discriminating against graduates of private, nonpublic or home schools by requiring them to submit to alternative testing
In effect July 6, 2021
Read the Entire Bill

In 2015, the Legislature enacted a statute authorizing administrators of secondary education at public, private and home schools to issue diplomas or other appropriate credentials to persons who complete the secondary education program. Because the diploma or credential is deemed legally sufficient to show that a person has a high school diploma or equivalent, West Virginia state institutions of higher learning are prohibited from rejecting or treating a person differently based upon the source of the diploma or credential. However, under the 2015 statute, an institution could inquire into and assess the substance or content of the program for the purpose of determining whether a person meets other specific requirements. *West Virginia Code § 18-8-12.*

House Bill 2529 now adds that once a student has been fully admitted, nothing in the statute prevents an institution of higher learning from administering placement tests or other assessments

to determine the student's appropriate placement into college-level course sequences. *West Virginia Code § 18-8-12.*

The bill also provides that a person who possesses such a diploma or credential, and who has acceptable test results on ACT, SAT or other tests recognized by the institution, may not be required to submit to alternate testing as a condition of admission. Further, a person who obtained a diploma or other appropriate credential may not be rejected for admission to an institution of higher education solely because their secondary education was not accredited by the State Board of Education or any accrediting agency approved by the State Board. *West Virginia Code § 18B-1-1e(d)(1); West Virginia Code § 18B-1-1e(d)(1).*

House Bill 2633
Creating the 2021 Farm Bill
In effect July 5, 2021
Read the Entire Bill

The West Virginia Fresh Food Act required schools, beginning July 1, 2019, to purchase a minimum of five percent of their fresh produce, meat and poultry products from in-state producers. House Bill 2021 modifies that requirement in several respects. *West Virginia Code § 19-27-2(a).*

First, the rule now specifies that the five percent minimum applies to foods that the schools 'obtain" rather than just purchase. *West Virginia Code § 19-27-2(a).*

Second, the five percent minimum for obtaining food from in-state producers will no longer apply to just fresh produce, meat and poultry products, but now will also apply to "milk and other dairy products, and other foods." *West Virginia Code § 19-27-2(b).*

Third, the bill clarifies that the five percent rule can be satisfied not only with food grown or produced by in-state producers, but also with food "processed" by them. *West Virginia Code § 19-27-2(b).*

The Commissioner of Agriculture is required to establish rules that contain criteria for a food or food product to satisfy these requirements. The Commissioner must also establish criteria for determining when exceptions or exemptions should be granted, such as when a desired food cannot be grown or is not available from in-state producers. Schools' contracts for the purchase of food, or that include the purchase of food as a component of the contract, must contain provisions to ensure that the schools comply with the provisions of the bill and any such rule of the Commissioner. *West Virginia Code § 19-27-2(c); West Virginia Code § 19-27-2(d); West Virginia Code § 19-27-2(e).*

House Bill 2763
Creating WV Cyber Incident Reporting
In effect July 5, 2021
Read the Entire Bill

Under House Bill 2763, when a county board of education determines that it experienced any of certain "cybersecurity incidents" it must, within ten days, report the incident to the State Cybersecurity Office. The county board may not first make any citizen notification of the incident. *West Virginia Code § 5A-6C-3.*

The kind of cybersecurity incident that must be reported is any "violation, or imminent threat of violation, of computer security policies, acceptable use policies, or standard security practices" that meets at least one of these criteria: (1) state or federal law requires the reporting of the incident to regulatory or law-enforcement agencies or affected citizens; (2) the ability of the entity that experienced the incident to conduct business is substantially affected; or (3) the incident would be classified as emergency, severe, or high by the U.S. Cybersecurity and Infrastructure Security Agency. *West Virginia Code § 5A-6C-1; West Virginia Code § 5A-6C-3.*

The required report must contain, at least, the approximate date of the incident, the date it was discovered, the nature of any data that may have been illegally obtained or accessed, and a list of all state and federal regulatory agencies, self-regulatory bodies and foreign regulatory agencies to whom the notice has been or will be provided. *West Virginia Code § 5A-6C-3.*

All executive branch state agencies, constitutional officers, local government entities, the judiciary and the Legislature are under the same duty to report. *West Virginia Code § 5A-6C-2.*

House Bill 2785
Relating to public school enrollment for students from out of state
In effect July 6, 2021
Read the Entire Bill

Attendance at a Montessori kindergarten, as before, is deemed school attendance for purposes of the compulsory attendance law. But, now, state-approved nonpublic kindergarten programs, homeschool kindergarten programs, Hope Scholarship kindergarten programs, and private, parochial or church kindergarten programs recognized under West Virginia Code § 18-9-1(k) also may satisfy the compulsory attendance law. If, after such kindergarten program, a student enters the public school system, they now must be placed in the developmentally and academically appropriate grade level. *West Virginia Code § 18-8-1a(c).*

The removal of a child from a kindergarten program may now occur when only the parent or guardian determines that the best interests of the child would not be served by requiring further attendance. Previously, the removal decision could also be made when the principal or teacher made that determination. Also, prior to enrolling in a publicly supported kindergarten program, a

parent may now apply for a Hope Scholarship on behalf of the child and, annually, will then have the option to renew the child's enrollment in the Hope Scholarship Program. *West Virginia Code § 18-8-1a(a)(1); West Virginia Code § 18-8-1a(b).*

A student from another state, or one who is eligible to enroll in a public school in West Virginia, must be enrolled in the same grade as they were enrolled at the school or program from which they transfer. For purposes of placement and credit assignment in the public schools, a transcript or other credential provided by a public school program, private school program, homeschool program or Hope scholarship program shall now be accepted by a West Virginia public school as a record of a student's previous academic performance. *West Virginia Code § 18-8-1a(e).*

House Bill 2791
Relating to enrollment and costs of homeschooled or private school students at vocational schools
In effect July 4, 2021
Read the Entire Bill

Under a new section of West Virginia Code, a county board of education must permit homeschooled and private school students to enroll and take classes at the county's vocational schools, if any are provided and as capacity allows, at no expense or cost greater than expenses or costs normally charged to public school students. If such a student is not permitted to enroll in a county vocational school, the county must, in writing, notify the parent or guardian, sending a copy to the State Department of Education. *West Virginia Code § 18-5-15g.*

House Bill 2852
Relating to the distribution of the allowance for increased enrollment
In effect June 30, 2021
Read the Entire Bill

Prior to House Bill 2852, the State Superintendent of Schools distributed to county boards of education, in two installments, funds that the Legislature appropriates as support for student enrollment that exceeds the enrollment used in computing total state aid to the school districts for that year. The first installment, transferred before September 1, was 60 percent of the county's total allowance for increased enrollment. Because the actual increase in student enrollment could not be ascertained until after September 1, this first installment was calculated based on a projection of the school district's increased enrollment instead of on actual enrollment figures.

The second distribution was made on or before December 31. By then the actual increase in student enrollment was known. The State Superintendent calculated the total amount of the county's allowance based on the actual enrollment increase, then deducted the amount of the first installment. The balance was remitted to the school district.

If it turned out that, based on projected enrollment, the distribution to a county board on or before September 1 was greater than the total amount of the allowance based upon its actual increase in enrollment, the county board was required to refund the difference to the State prior to June 30 of the same fiscal year.

House Bill 2852 requires the State Superintendent to now calculate a county board's allowance for increased enrollment based on the actual, rather than projected, increase in enrollment, and to distribute the allowance to each county in a single transfer on or before December 31 of each year. But if, before the actual increase in net enrollment is known, a school district requests an early distribution of up to 60 percent of its estimated share based on its projected enrollment increase, the State Superintendent is authorized to do so. In that case, if the county's actual increase in enrollment turns out to be lower than the projection, the school district must refund any overpayment prior to June 30. Whenever an advanced partial distribution is made, the State Department of Education must notify committees of the Legislature. *West Virginia Code § 18-9A-15(3); West Virginia Code § 18-9A-15(4).*

House Bill 2906
Relating to the School Building Authority's allocation of money
In effect July 5, 2021
<u>*Read the Entire Bill*</u>

The State School Building Authority laws have until now given the Authority discretion to allocate up to three percent of available funds (other than the School Major Improvement Fund and the School Access Safety fund) for projects serving the educational community statewide, facilities under direct supervision of the State Board of Education, and school major improvement projects for multicounty vocational technical centers, vocational programs at comprehensive high schools and comprehensive middle schools, and vocational schools that cooperate with community and technical college programs. The cap on such allocations is increased to ten percent under House Bill 2906. *West Virginia Code § 18-9D-15(b).*

House Bill 2916
Creating the Semiquincentennial Commission for the celebration of the 250th anniversary of the founding of the United States of America
In effect April 7, 2021
<u>*Read the Entire Bill*</u>

To prepare for and commemorate the 250th anniversary of our nation's founding, the Legislature creates the ten-member West Virginia Semiquincentennial Commission, one of whose members is the State Superintendent of Schools. The Commission will develop, lend technical assistance to and encourage programs and events involving localities, organizations and all West Virginians. *West Virginia Code § 4-13A-1; West Virginia Code § 4-13A-2; West Virginia Code § 4-13A-6.*

House Bill 3177
Removing expired, outdated, inoperative and antiquated provisions and report requirements in education
In effect July 9, 2021
Read the Entire Bill

The Legislature repeals and removes from State Code a number of public education-related provisions that it considers expired, outdated, inoperative or antiquated.

Among them is West Virginia Code § 18-2-35, which required the State Board of Education to adopt rules allowing county boards of education to implement dress codes requiring students to wear school uniforms.

The bill also removes provisions from various sections of chapter 18, article 9B of the Code that created the State Board of School Finance and established its powers and duties. The State Superintendent of Schools is now required by the school finance laws to exercise those powers and duties.

House Bill 3191
Requiring employers to send certain notifications when retirants are hired as temporary, part-time employees
In effect July 6, 2021
Read the Entire Bill

An amendment to the State Public Employees Retirement Act requires that when a retired employee becomes employed on a part-time, temporary basis by a participating employer, the employer must notify the employee if their subsequent employment will negatively impact their retired status or benefits. *West Virginia Code § 5-10-19(b).*

A corresponding amendment to the State Teachers Retirement System statutes requires that when a retired employee subsequently becomes employed on a part-time, temporary basis, which, if full-time, would qualify them as a teacher member or nonteaching member of the system, the employer must notify the individual if their subsequent employment will negatively impact their retired status or benefits. *West Virginia Code § 18-7A-13a.*

House Bill 3266
Providing for termination of extracurricular contract upon retirement
In effect July 1, 2021
Read the Entire Bill

This bill provides that, effective with the retirement of a county board of education employee on or after July 1, 2021, any extracurricular contract of the employee shall terminate when the employee retires. However, retired employees are permitted to apply for and, if they are the

successful applicant, may be employed in an extracurricular assignment or other position with the county board, consistent with rules established by the Consolidated Public Retirement Board for the employment of retirees. *West Virginia Code § 18A-4-16(7).*

House Bill 3293
Relating to single-sex participation in interscholastic athletic events
In effect July 8, 2021
Read the Entire Bill

Finding that classification of sports teams, according to biological sex at birth is necessary to promote equal athletic opportunities for the female sex, the Legislature requires that each interscholastic, intercollegiate, intramural, or club athletic team or sport, sponsored by any public secondary school or state institution of higher education, must be designated as one of the following, based on biological sex: (1) males, men, or boys; (2) females, women, or girls; or (3) co-ed or mixed. *West Virginia Code § 18-2-25d(a)(5); West Virginia Code § 18-2-25d(c)(1).*

Under House Bill 3293, athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, nothing in the statute may be construed to restrict the eligibility of any student to participate on teams or sports designated as "males," "men" or "boys" or designated as "co-ed" or "mixed," and selection for such a team may still be based on those who try out and possess the requisite skill to make the team. *West Virginia Code § 18-2-25d(c)(2); West Virginia Code § 18-2-25d(c)(3).*

A student claiming a violation of the statute may bring an action against the county board or higher education institution, seeking injunctive relief and actual damages, as well as reasonable attorneys' fees and court costs if the student substantially prevails. The State Board of Education is required to adopt rules, including emergency rules, to implement House Bill 3293 for public secondary schools. *West Virginia Code § 18-2-25d(d); West Virginia Code § 18-2-25d(e).*

House Bill 3294
Relating to unemployment insurance
In effect July 1, 2021
Read the Entire Bill

A new section of State Code provides that an employer may contact Workforce West Virginia in situations when an employee who was previously laid off by that employer is given the opportunity to be rehired but declines to do so. In response, Workforce West Virginia must investigate to determine whether the employee should continue to receive unemployment benefits. *West Virginia Code § 21A-2D-6.*

RECENT DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

1. State of West Virginia ex rel. West Virginia Academy, LTD. V. West Virginia Department of Education, No. 21-0097 (June 15, 2021) (memorandum opinion). Under the 2019 public charter school legislation, the State Department of Education has no authority, let alone a legal duty, to authorize, certify or deem a public charter school application as approved. The Department's role in the process is to receive an application after it has already been approved or deemed approved by the authorizer. Even under a 2021 amendment of the public charter school act that created a process for appealing an authorizer's decision, the appeal is to the State Board of Education, not the Department of Education.

2. C.C. and J.C. v. Harrison County Board of Education, No. 20-0171 (June 17, 2021). Liability for negligent retention may be imposed on a county board when an injury occurred as a result of its retention of an "unfit employee" and such risk of injury was reasonably foreseeable to the employer.

3. Long v. Hardy County Board of Education, No. 20-0064 (July 19, 2021) (memorandum opinion). In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

   Also, to establish prima facie proof of tortious interference with a plaintiff's business, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. If a plaintiff makes a prima facie case of tortious interference, a defendant may prove justification or privilege, affirmative defenses. Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.

RECENT DECISIONS OF THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

1. Courts v. Kanawha County Board of Education, Docket No. 2019-1892-CONS (May 13, 2021). For disciplinary purposes, even when a board labels an employee's conduct as "insubordination," an initial inquiry must be made into whether the conduct is correctable, entitling the employee to an improvement period. To that end, the employer must consider whether the conduct involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.

2. Barker v. Cabell County Board of Education, Docket No. 2019-1239-CONS (June 3, 2021). The school service personnel classifications of aide and Early Childhood Classroom Assistant Teacher (ECCAT) accrue seniority independently from each other for purposes of a reduction in force. As such, only the seniority for the specific classification subject to a reduction in force shall be considered in ranking the seniority of the affected personnel. Also, a random selection process must be used to establish the seniority rankings of employees in the ECCAT classification who have identical ECCAT seniority dates, regardless of their seniority dates as aides.

3. Stewart v. Mineral County Board of Education, Docket No. 2020-1561-CONS (June 4, 2021). A school employee may be disciplined for immorality even though his inappropriate conduct with a student involved no sexual contact.

4. Hogsett v. Cabell County Board of Education, Docket No. 2020-0856-CONS (July 1, 2021). In considering the disciplinary discharge of a county board employee, the essential due process requirements, notice and an opportunity to respond, are met if the employee is given oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination. The county board is not required to hold a formal hearing as long as the employee is given an opportunity to tell their story. Nor is the county board required to give the employee a particular amount of time to present their case.

5. Persinger v. Mercer County Board of Education, Docket No. 2020-0289-MerED (July 9, 2021). A statute provides that school counselors shall spend at least 80% of work time in a "direct counseling relationship with pupils" and devote no more than 20% of the workday to administrative activities that are counselor related. The phrase "direct counseling relationship with pupils" is ambiguous. Together with a State Board policy, the statute sets forth requirements for school counseling programs and the duties of school counselors. A counselor is authorized to perform such services as are not inconsistent with the provisions of the State Board policy.

6. Meddings v. Wayne County Board of Education, Docket No. 2020-1523-WayED (June 23, 2021). Reprisal is retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. To demonstrate a prima facie case of reprisal, a grievant must establish by a preponderance of the evidence that: (1) they engaged in protected activity; (2) they were subsequently treated in an adverse manner by the county board or an agent; (3) the county board's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and, (4) there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment. The general rule is that an employee must prove by a preponderance of the evidence that their protected activity was a significant, substantial or motivating factor in the adverse personnel action. An inference can be drawn that the employer's actions were the result of a retaliatory motive if the adverse action occurred within a short time period after the protected activity. An employer may rebut the presumption of retaliatory action by offering credible evidence of legitimate nondiscriminatory reasons for its actions. Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. However, mere allegations alone without substantiating facts are insufficient.

7. Mize v. Cabell County Board of Education, Docket No. 2019-1644-CabED (August 5, 2021). Before a county board employee grieves disciplinary action, they are not entitled to see the report of an outside investigator, as long as they are provided with notice of the charges, an explanation of the evidence, and an opportunity to be heard. Also, a principal's failure to properly follow clear safety protocols may constitute willful neglect of duty and insubordination.

8. Price v. Hampshire County Board of Education, Docket No. 2021-0319-HamED (August 13, 2021). Even though, by statute, county boards are mandated to install video cameras only in self-contained special education classrooms, a county board may lawfully install cameras in all its special education classrooms, at least where the resulting videos are treated under the same statutory rules as those from self-contained classrooms.

9. Wroblewski v. Wayne County Board of Education, Docket No. 2021-1507-WayED (September 7, 2021). A county board must fill professional positions established under the summer school program statute on the basis of certification and length of time the professional has been employed in the county's summer school program. If no employee-applicant who has been previously employed in the summer school program holds a valid certification or licensure for the position, the county board must fill the position under the statute that governs the filling of vacancies in regular positions of professional employment.

Bowles Rice
Attorneys at Law

RECENT ETHICS COMMISSION ADVISORY OPINION

1. Ethics Commission Advisory Opinion No. 2021-13, (June 3, 2021). The Ethics Act prohibits a board member or business with which he or she is associated from having more than a limited interest in the profits or benefits of a contract over which that board member has a direct authority or control. Being a salaried employee of a business, which has a contract with the board does not, by itself, create this prohibited association. Unless a board member – or a member of his or her immediate family – is an officer, director or owner of 5% or more of the stock of a business, the board member is not associated with that business. A board member who is not associated with a business which contracts with the board is not prohibited by the Ethics Act from being a salaried employee of that business.

   Board members have voice, influence, and/or control over all school board contracts. And the Pecuniary Interest Statute prohibits a board member from having a financial interest in any of the board's contracts. However, there are exceptions. A board member is not prohibited from being a salaried employee of a business which has a contract with the board if the board member (and his or her spouse or child): 1) is not a party to the contract; 2) is not an owner, a shareholder, a director or an officer of a private entity under the contract; 3) receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract; 4) does not participate in the deliberations or awarding of the contract; and 5) does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

   A board member who is not prohibited by the Ethics Act and the Pecuniary Interest Statute from being a salaried employee of a business which contracts with his or her board must recuse himself or herself from voting on any item that concerns payments to the business.

AUTHORIZED AND UNAUTHORIZED EXPENDITURES

The following is a partial list of expenditures that are considered to be authorized or unauthorized by either the State Attorney General or the State Superintendent of Schools. The list includes only opinions of the Attorney General or interpretations of the State Superintendent of Schools issued since 1987.

Be aware in reviewing the list that applicable statutes and State Board policies may have changed since the views contained herein were expressed. Also, it is possible that the unique facts of a particular situation may distinguish it significantly from the circumstances that existed at the time these opinions and interpretations were rendered.

In addition, the opinions and interpretations included herein should be considered only as guidelines, since neither the State Attorney General nor the State Superintendent of Schools serve as statutory or appointed attorney for the county boards of education. The advice of the board's attorney of record should be obtained on any questions concerning the legality of a particular expenditure.

Expenditures considered to be **unauthorized** by either the State Attorney General or the State Superintendent of Schools:

- The payment of dues to become a member of a local Chamber of Commerce (Attorney General Opinion of May 7, 1987)

- The expenditure of public or quasi-public funds for the purchase of food and drink for board of education meetings (Attorney General Opinion of May 7, 1987)

- The expenditure of public or quasi-funds for the purchase of food and drink for meetings of school principals (Attorney General Opinion of May 7, 1987)

- The expenditure of public or quasi-funds for the purchase of food and drink for meetings of the public (Attorney General Opinion of May 7, 1987)

- The use of school moneys to buy coffee and doughnuts for the staff as a morale booster (State Superintendent Interpretation of November 16, 1992)

- The use of funds from an individual school's general accounts for the purchase of flowers, gifts, service awards, and other awards to recognize employees for outstanding services (State Superintendent Interpretation of October 6, 1992)

- The use of gate receipts to repay a loan which was obtained by a coach and private supporters, without board knowledge or approval, to build a school athletic facility (State Superintendent Interpretation of August 31, 1992)

- The use of gate receipts, vending machine profits, and other school funds to buy a table and chair for a teachers' lounge (State Superintendent Interpretation of June 9, 1992)

- The expenditure of quasi-public funds for meals which are solely for school officials, administrators, faculty and other personnel (State Superintendent Interpretation of July 17, 1992)

- The use by principals of school general account funds (raised from snack machines, school sales, dances, etc.) to attend and pay expenses for state and national conferences (State Superintendent Interpretation of December 5, 1989)

- The use of school general account funds (raised from snack machines, school sales, dances, etc.) to buy coffee, doughnuts, etc. for staff development meetings, staff meetings, etc. (State Superintendent Interpretation of December 5, 1989)

- The payment from a school's general fund the membership fee of an elementary principal in the West Virginia Elementary School Principals Association and the National Elementary School Principals Association (State Superintendent Interpretation of December 5, 1989)

Expenditures considered to be **authorized** by either the State Attorney General or the State Superintendent of Schools:

- The use of gate receipts, vending machine profits, and other school funds to buy flowers and shrubs for the school lawn (State Superintendent Interpretation of June 9, 1992)

- The use of quasi-public funds raised or accepted by a faculty senate to buy a table and chairs for a teachers' lounge (State Superintendent Interpretation of June 9, 1992)

- The purchase of a table and chairs for a teachers' lounge with money granted to the school by the PTA or PTO for that purpose (State Superintendent Interpretation of June 9, 1992)

- The use of a school's athletic fund to reimburse a head coach for the expense of attending a sports rule clinic mandated by the West Virginia Secondary Schools Activities Commission (State Superintendent Interpretation of October 3, 1988)

- The use of quasi-public funds to pay for student sports banquets, academic banquets, pizza parties (to reward high test scores), etc., subject to certain general limitations regarding the amount of money spent on different student groups (State Superintendent Interpretation of June 9, 1987)

- The use of quasi-public school funds to purchase awards, trophies, etc., for students for academics and athletics, subject to certain limitations regarding gender equality, equality between athletic and academic programs, and students with disabilities. (State Superintendent Interpretation of June 9, 1987)

Agreement Addendum

Instructions

Attached is a universal **"Agreement Addendum"** form which an LEA should complete and include as a part of the final contract/agreement any time a vendor requires the LEA to sign the vendor's contract/agreement or the vendor submits alternate language with its bid or contract. LEAs are urged to execute the **Agreement Addendum** for all contracts, agreements or leases where equipment with maintenance is included.

AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **DISPUTES -** Any references in the agreement to arbitration or to jurisdiction of any court other than the Circuit Court of the county in which the Agency is located are hereby deleted. The parties may agree to nonbinding mediation prior to litigation.

2. **HOLD HARMLESS** - Any clause requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.

3. ~~**GOVERNING LAW** -The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.~~

4. **TAXES**. - Provisions in the agreement requiring the Agency to pay taxes are deleted. As a political subdivision of the State of West Virginia, the Agency is generally exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor or any other party.

5. **PAYMENT** - Any references to prepayment are deleted. Fees for software licenses, subscriptions, or maintenance are payable annually in advance. Payment for services will be in arrears.

6. **INTEREST** – Any provision for interest or charges on late payments is deleted. The Agency has no statutory authority to pay interest or late fees.

7. **NO WAIVER** - Any language in the agreement requiring the Agency to waive any rights,claims or defenses is hereby deleted.

8. **FISCAL YEAR FUNDING** - Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.

9. **STATUTE OF LIMITATION** - Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.

10. **SIMILAR SERVICES** - Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.

11. **ATTORNEY FEES** - The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.

12. **ASSIGNMENT** - Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to a State agency or another local governmental agency, board or commission of the State of West Virginia upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.

13. **LIMITATION OF LIABILITY** - The Agency, as a political subdivision of the State, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages to a certain dollar amount or to the amount of the agreement is hereby deleted. Limitations on special, incidental or consequential damages are acceptable. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.

14. **RIGHT TO TERMINATE** - Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor. Agency agrees to pay Vendor for services rendered or goods received prior to the effective date of termination. In such event, the Agency will not be entitled to a refund of any software license, subscription or maintenance fees paid.

15. **TERMINATION CHARGES** - Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.

16. **RENEWAL** - Any reference to automatic renewal is hereby deleted. The agreement may be renewed only upon mutual written agreement of the parties.

17. **INSURANCE** - Any provision requiring the Agency to purchase insurance for Vendor's property is deleted. The Agency is insured through the Board of Risk and Insurance Management, and will provide a certificate of property insurance upon request.

18. **RIGHT TO NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.

19. **ACCELERATION** – Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.

20. **CONFIDENTIALITY** – Any provision regarding confidentiality of the terms and conditions of the agreement is hereby deleted. Governmental contracts are public records under the West Virginia Freedom of Information Act.

21. **AMENDMENTS** -All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval of the Agency.

ACCEPTED BY:

Local Education Agency: ______________________

____

Signed: ______________________

Title: ______________________

VENDOR:

Company Name:

Signed: ______________________

Title: ______________________

Date: ______________________________ Date: ______________________________

Revised 07-12

Bowles Rice
Attorneys at Law

TOP 10 ISSUES FOR CONTRACT REVIEW

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1. **The "Board of Education" is always the correct entity to enter into a contract.**

   - Individual schools are buildings, not legal entities, and are not the appropriate party to enter into any contracts.

2. **The Superintendent is almost always the appropriate officer or administrator to sign the contract.**

   - However, you should check your policies. It is possible that some other administrator has been authorized by a school board's policies to execute certain types of contracts.

3. **Is the expenditure authorized?**

   - Appendix C to Policy 1224.1 (which is included in your materials) provides a list of expenditures considered by the State Attorney General or the State Superintendent to be unauthorized or authorized. If you have any doubts, you should consult that list or seek advice. Note that the list is not exhaustive.

   - Violations of this rule may result in criminal charges and personal liability for expenditures.

4. **Always attach the Agreement Addendum, which is attached as Exhibit C to Policy 8200 and included in your materials.**

   - If you have any doubts about whether it is appropriate to attach the Agreement Addendum, always err on the side of caution and attach the Agreement Addendum

   - *Relatedly, make sure that the vendor actually signs the Agreement Addendum.*

5. **It is preferrable that every contract contain language incorporating the Agreement Addendum into the contract.**

   - For instance, a sentence may be added indicating that in the event of a conflict between the contract and the Agreement Addendum the terms of the Agreement Addendum control.

6. **Duration of the Contract: A contract should cover a 12-month period or cite a specific time for completion for the project or service.**

7. **"Annual Out" Clause: If a contract is for a duration exceeding the end of the fiscal year, the contract should contain a provision allowing the school board to cancel the contract with advance notice.**

8. **Do not take on the liabilities or debts of the vendor or other party to the contract, which is often called an "indemnification" or "hold harmless" clause.**

   - This is covered by the Agreement Addendum (and a reason the addendum should be attached), but it is an issue that vendors or other parties unfamiliar with school boards may not understand.

9. **General rule of thumb No. 1: Be wary of contracts sent from out-of-state vendors.**

   - These large, national vendors (think national schoolbook company) will often have large contract forms that they use for all contracts. These contracts may or may not have terms that are contrary to the laws in West Virginia. At a minimum, these vendors, like all others, should sign the Agreement Addendum and the contracts will often need to be modified to reflect that the contracts are subject to the Agreement Addendum.

10. **Rule of Thumb No. 2: Just because the "Board of Education of the County of Mayberry" does something one way does not mean it is correct.**

   - This is never a justification for a school board taking a certain action (with regard to contracts or any other action). You should consult your local policies, State Board policies 8200 and 1224.1, and/or seek advice if you have doubts.

10.1. **Bonus Rule - "Stringing" Contracts: Stringing is unlawful under State Board Policy.**

   - "Stringing" is defined by Policy 8200 as the "illegal practice of issuing a series of requisitions or purchase orders for the purpose of circumventing the competitive bidding procedures."

   - This is possible to do by accident, such as a situation where the school board desires to replace certain items, equipment, or goods, but wants to do it in stages over the course of a few years.

   - If cumulatively, those expenditures exceed $5,000, you must bid the contract.

~~**§21-5I-4. Classification of independent contractors and employees.**~~

(a) Subject only to the provisions of subsection (b) of this section, a person shall be classified as an independent contractor under the laws of this state as defined in workers' compensation in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and wage payment and collection as defined in §21-5-1 et seq. of this code, if:

(1) The person signs a written contract with the principal, in substantial compliance with the terms of this subsection, that states the principal's intent to engage the services of the person as an independent contractor and contains acknowledgements that the person understands that he or she is:

(A) Providing services for the principal as an independent contractor;

(B) Not going to be treated as an employee of the principal;

(C) Not going to be provided by the principal with either workers' compensation or unemployment compensation benefits;

(D) Obligated to pay all applicable federal and state income taxes, if any, on any moneys earned pursuant to the contractual relationship, and that the principal will not make any tax withholdings from any payments from the principal; and

(E) Responsible for the majority of supplies and other variable expenses that he or she incurs in connection with performing the contracted services unless: The expenses are for travel that is not local; the expenses are reimbursed under an express provision of the contract; or the supplies or expenses reimbursed are commonly reimbursed under industry practice; and

(2) The person:

(A) Has either filed, or is contractually required to file, in regard to the fees earned from the work, an income tax return with the appropriate federal, state, and local agencies for a business or for earnings from self-employment; or

(B) Provides his or her services through a business entity, including, but not limited to, a partnership, limited liability company or corporation, or through a sole proprietorship registered with a "doing business as" as required under state or local law; and

(3) With the exception of the exercise of control necessary to ensure compliance with statutory, regulatory, licensing, permitting, or other similar obligations required by a governmental or regulatory entity, or to protect persons or property, or to protect a franchise brand,

the person actually and directly controls the manner and means by which the work is to be accomplished, even though he or she may not have control over the final result of the work. Provided, That the required deployment, implementation, or use of any safety improvement by an independent contractor as required by contract or otherwise shall not be considered when evaluating status as an employee or independent contractor under any state law. For purposes of this section, "safety improvement" shall mean any device, equipment, software, technology, procedure, training, policy, program, or operational practice intended and primarily used to improve or facilitate compliance with state, federal, or local safety laws or regulations or general safety concerns. This provision is satisfied even though the principal may provide orientation, information, guidance, or suggestions about the principal's products, business, services, customers and operating systems, and training otherwise required by law; and

(4) The person satisfies three or more of the following criteria:

(A) Except for an agreement with the principal relating to final completion or final delivery time or schedule, range of work hours, or the time entertainment is to be presented if the work contracted for is entertainment, the person has control over the amount of time personally spent providing services;

(B) Except for services that can only be performed at specific locations, the person has control over where the services are performed;

(C) The person is not required to work exclusively for one principal unless:

(i) A law, regulation, or ordinance prohibits the person from providing services to more than one principal; or

(ii) A license or permit that the person is required to maintain in order to perform the work limits the person to working for only one principal at a time or requires identification of the principal;

(D) The person is free to exercise independent initiative in soliciting others to purchase his or her services;

(E) The person is free to hire employees or to contract with assistants, helpers, or substitutes to perform all or some of the work;

(F) The person cannot be required to perform additional services without a new or modified contract;

(G) The person obtains a license or other permission from the principal to utilize any workspace of the principal in order to perform the work for which the person was engaged;

(H) The principal has been subject to an employment audit by the Internal Revenue Service (IRS) and the IRS has not reclassified the person to be an employee or has not reclassified the category of workers to be employees;

(I) The person is responsible for maintaining and bearing the costs of any required business licenses, insurance, certifications, or permits required to perform the services; or

(5) The person satisfies the definition of a direct seller under Section 3508(b)(2) of the Internal Revenue Code of 1986.

(b) The classification of all workers who do not satisfy the criteria set forth in subsection (a) of this section shall be determined by the test set forth in Internal Revenue Service Rev. Ruling 87-41, for purposes of classifying workers under the laws concerning workers' compensation as defined in chapter 23 of this code, unemployment compensation in chapter 21A of this code, Human Rights Act rights in §5-11-1 et seq. of this code, and wage payment and collection in §21-5-1 et seq. of this code. In addition, nothing contained in said subsection requires a principal to classify a worker who meets the criteria contained therein as an independent contractor, the principal always being free to hire the worker as an employee.

Rev. Rul. 87-41

1987-1 C.B. 296.

Internal Revenue Service
Revenue Ruling

EMPLOYMENT STATUS UNDER SECTION 530(D) OF THE REVENUE ACT OF 1978

Published: 1987

Section 3121.-Definitions, 26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

Employment status under section 530(d) of the Revenue Act of 1978. Guidelines are set forth for determining the employment status of a taxpayer (technical service specialist) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialists are to be classified as employees under generally applicable common law standards.

ISSUE

In the situations described below, are the individuals employees under the common law rules for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24 respectively, subtitle C, Internal Revenue Code)? These situations illustrate the application of section 530(d) of the Revenue Act of 1978, 1978-3 (Vol. 1) C.B. xi, 119 (the 1978 Act), which was added by section 1706(a) of the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. ___ (the 1986 Act) (generally effective for services performed and remuneration paid after December 31, 1986).

FACTS

In each factual situation, an individual worker (Individual), pursuant to an arrangement between one person (Firm) and another person (Client), provides services for the Client as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

SITUATION 1

The Firm is engaged in the business of providing temporary technical services to its clients. The Firm maintains a roster of workers who are available to provide technical services to prospective clients. The Firm does not train the workers but determines the services that the workers are qualified to perform based on information submitted by the workers.

The Firm has entered into a contract with the Client. The contract states that the Firm is to provide the Client with workers to perform computer programming services meeting specified qualifications for a particular project. The Individual, a computer programmer, enters into a contract with the Firm to perform services as a computer programmer for the Client's project, which is expected to last less than one year. The Individual is one of several programmers provided by the Firm to the Client. The Individual has not been an employee of or performed services for the Client (or any predecessor or affiliated corporation of the Client) at any time preceding the time at which the Individual begins performing services for the Client. Also, the Individual has not been an employee of or performed services for or on behalf of the Firm at any time preceding the time at which the Individual begins performing services for the Client. The Individual's contract with the Firm states that the Individual is an independent contractor with respect to services performed on behalf of the Firm for the Client.

The Individual and the other programmers perform the services under the Firm's contract with the Client. During the time the Individual is performing services for the Client, even though the Individual retains the right to perform services for other persons, substantially all of the Individual's working time is devoted to performing services for the Client. A significant

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portion of the services are performed on the Client's premises. The Individual reports to the Firm by accounting for time worked and describing the progress of the work. The Firm pays the Individual and regularly charges the Client for the services performed by the Individual. The Firm generally does not pay individuals who perform services for the Client unless the Firm provided such individuals to the Client.

The work of the Individual and other programmers is regularly reviewed by the Firm. The review is based primarily on reports by the Client about the performance of these workers. Under the contract between the Individual and the Firm, the Firm may terminate its relationship with the Individual if the review shows that he or she is failing to perform the services contracted for by the Client. Also, the Firm will replace the Individual with another worker if the Individual's services are unacceptable to the Client. In such a case, however, the Individual will nevertheless receive his or her hourly pay for the work completed.

Finally, under the contract between the Individual and the Firm, the Individual is prohibited from performing services directly for the Client and, under the contract between the Firm and the Client, the Client is prohibited from receiving services from the Individual for a period of three months following the termination or services by the Individual for the Client on behalf of the Firm.

SITUATION 2

The Firm is a technical services firm that supplies clients with technical personnel. The Client requires the services of a systems analyst to complete a project and contacts the Firm to obtain such an analyst. The Firm maintains a roster of analysts and refers such an analyst, the Individual, to the Client. The Individual is not restricted by the Client or the Firm from providing services to the general public while performing services for the Client and in fact does perform substantial services for other persons during the period the Individual is working for the Client. Neither the Firm nor the Client has priority on the services of the Individual. The Individual does not report, directly or indirectly, to the Firm after the beginning of the assignment to the Client concerning (1) hours worked by the Individual, (2) progress on the job, or (3) expenses incurred by the Individual in performing services for the Client. No reports (including reports of time worked or progress on the job) made by the Individual to the Client are provided by the Client to the Firm.

If the Individual ceases providing services for the Client prior to completion of the project or if the Individual's work product is otherwise unsatisfactory, the Client may seek damages from the Individual. However, in such circumstances, the Client may not seek damages from the Firm, and the Firm is not required to replace the Individual. The Firm may not terminate the services of the Individual while he or she is performing services for the Client and may not otherwise affect the relationship between the Client and the Individual. Neither the Individual nor the Client is prohibited for any period after termination of the Individual's services on this job from contracting directly with the other. For referring the Individual to the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. The Individual is not paid by the Firm either directly or indirectly. No payment made by the Client to the Individual reduces

the amount of the fee that the Client is otherwise required to pay the Firm. The Individual is performing services that can be accomplished without the Individual's receiving direction or control as to hours, place of work, sequence, or details of work.

SITUATION 3

The Firm, a company engaged in furnishing client firms with technical personnel, is contacted by the Client, who is in need of the services of a drafter for a particular project, which is expected to last

less than one year. The Firm recruits the Individual to perform the drafting services for the Client. The Individual performs substantially all of the services for the Client at the office of the Client, using materials and equipment of the Client. The services are performed under the supervision of employees of the Client. The Individual reports to the Client on a regular basis. The Individual is paid by the Firm based on the number of hours the Individual has worked for the Client, as reported to the Firm by the Client or as reported by the Individual and confirmed by the Client. The Firm has no obligation to pay the Individual if the Firm does not receive payment for the Individual's services from the Client. For recruiting the Individual for the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. However, the Firm does receive a reasonable fee for performing the payroll function. The Firm may not direct the work of the Individual and has no responsibility for the work performed by the Individual. The Firm may not terminate the services of the Individual. The Client may terminate the services of the Individual without liability to either the Individual or the Firm. The Individual is permitted to work for another firm while performing services for the Client, but does in fact work for the Client on a substantially full-time basis.

LAW AND ANALYSIS

This ruling provides guidance concerning the factors that are used to determine whether an employment relationship exists between the Individual and the Firm for federal employment tax purposes and applies those factors to the given factual situations to determine whether the Individual is an employee of the Firm for such purposes. The ruling does not reach any conclusions concerning whether an employment relationship for federal employment tax purposes exists between the Individual and the Client in any of the factual situations.

Analysis of the preceding three fact situations requires an examination of the common law rules for determining whether the Individual is an employee with respect to either the Firm or the Client, a determination of whether the Firm or the Client qualifies for employment tax relief under section 530(a) of the 1978 Act, and a determination of whether any such relief is denied the Firm under section 530(d) of the 1978 Act (added by Section 1706 of the 1986 Act).

An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in the following three substantially similar sections of the Employment Tax Regulations: sections 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.

These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

Conversely, these sections provide, in part, that individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees.

Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is

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designated as a partner, coadventurer, agent, independent contractor, or the like.

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. INSTRUCTIONS. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

2. TRAINING. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229.

3. INTEGRATION. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See United States v. Silk, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. SERVICES RENDERED PERSONALLY. If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

5. HIRING, SUPERVISING, AND PAYING ASSISTANTS. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593 1955-2 C.B. 610.

6. CONTINUING RELATIONSHIP. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See United States v. Silk.

7. SET HOURS OF WORK. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

8. FULL TIME REQUIRED. If the worker must devote substantially full time to

the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the

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worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

9. DOING WORK ON EMPLOYER'S PREMISES. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694.

10. ORDER OR SEQUENCE SET. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. See Rev. Rul. 56-694.

11. ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

12. PAYMENT BY HOUR, WEEK, 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 Sec. straight commission generally indicates that the worker is an independent contractor. See Rev. Rul. 74-389, 1974-2 C.B. 330.

13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

14. FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

15. SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer- employee relationship. See Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is

generally an independent contractor, but the worker who cannot is an employee. See Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to 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. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risK to support treatment as an independent contractor.

17. WORKING FOR MORE THAN ONE FIRM AT A TIME. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker 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 arrangement.

18. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660.

19. RIGHT TO DISCHARGE. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

20. RIGHT TO TERMINATE. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309.

Rev. Rul. 75-41 considers the employment tax status of individuals performing services for a physician's professional service corporation. The corporation is in the business of providing a variety of services to professional people and firms (subscribers), including the services of secretaries, nurses, dental hygienists, and other similarly trained personnel. The individuals who are to perform the services are recruited by the corporation, paid by the corporation, assigned to jobs, and provided with employee benefits by the corporation. Individuals who enter into contracts with the corporation agree they will not contract directly with any subscriber to which they are assigned for at least three months after cessation of their contracts with the corporation. The corporation assigns the individual to the subscriber to work on the subscriber's premises with the subscriber's equipment. Subscribers have the right to require that an individual furnished by the corporation cease providing services to them, and they have the further right to have such individual replaced by the corporation within a reasonable period of time, but the subscribers have no right to affect the contract between the individual and the corporation. The corporation retains the right to discharge the individuals at any time. Rev. Rul. 75-41 concludes that the individuals are employees of the corporation for federal employment tax purposes.

Rev. Rul. 70-309 considers the employment tax status of certain individuals who perform services as oil well pumpers for a corporation under contracts that characterize such individuals as independent contractors. Even though the pumpers perform their services away from the headquarters of the corporation and are not given day-to-day directions and instructions, the ruling concludes that the pumpers are employees of the corporation because the pumpers perform their services pursuant to an arrangement that gives the corporation the right to exercise whatever control is necessary to assure proper performance of the services; the pumpers' services are both necessary and incident to the business conducted

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by the corporation; and the pumpers are not engaged in an independent enterprise in which they assume the usual business risks, but rather work in the course of the corporation's trade or business. See also Rev. Rul. 70-630, 1970-2 C.B. 229, which considers the employment tax status of sales clerks furnished by an employee service company to a retail store to perform temporary services for the store.

Section 530(a) of the 1978 Act, as amended by section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 536, provides, for purposes of the employment taxes under subtitle C of the Code, that if a taxpayer did not treat an individual as an employee for any period, then the individual shall be deemed not to be an employee, unless the taxpayer had no reasonable basis for not treating the individual as an employee. For any period after December 31, 1978, this relief applies only if both of the following consistency rules are satisfied: (1) all federal tax returns (including information returns) required to be filed by the taxpayer with respect to the

individual for the period are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee ('reporting consistency rule'), and (2) the taxpayer (and any predecessor) has not treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for periods beginning after December 31, 1977 ('substantive consistency rule').

The determination of whether any individual who is treated as an employee holds a position substantially similar to the position held by an individual whom the taxpayer would otherwise be permitted to treat as other than an employee for employment tax purposes under section 530(a) of the 1978 Act requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals. Differences in the positions held by the respective individuals that result from the taxpayer's treatment of one individual as an employee and the other individual as other than an employee (for example, that the former individual is a participant in the taxpayer's qualified pension plan or health plan and the latter individual is not a participant in either) are to be disregarded in determining whether the individuals hold substantially similar positions.

Section 1706(a) of the 1986 Act added to section 530 of the 1978 Act a new subsection (d), which provides an exception with respect to the treatment of certain workers. Section 530(d) provides that section 530 shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. Section 530(d) of the 1978 Act does not affect the determination of whether such workers are employees under the common law rules. Rather, it merely eliminates the employment tax relief under section 530(a) of the 1978 Act that would otherwise be available to a taxpayer with respect to those workers who are determined to be employees of the taxpayer under the usual common law rules. Section 530(d) applies to remuneration paid and services rendered after December 31, 1986.

The Conference Report on the 1986 Act discusses the effect of section 530(d) as follows:

The Senate amendment applies whether the services of [technical service workers] are provided by the firm to only one client during the year or to more than one client, and whether or not such individuals have been designated or treated by the technical services firm as independent contractors, sole proprietors, partners, or employees of a personal service corporation controlled by such individual. The effect of the provision cannot be avoided by claims that such technical service personnel are employees of personal service corporations controlled by such personnel. For example, an engineer retained by a technical services firm to provide services to a manufacturer cannot avoid the effect of this provision by organizing a

corporation that he or she controls and then claiming to provide services as an employee of that corporation.

* * * [T]he provision does not apply with respect to individuals who are classified, under the generally applicable common law standards, as employees of a business that is a client of the technical services firm.

2 H. R. Rep. No. 99-841 (Conf. Rep.), 99th Cong., 2d Sess. II-834 to 835 (1986).

Under the facts of Situation 1 the legal relationship is between the Firm and the Individual, and the Firm retains the right of control to insure that the services are performed in a satisfactory fashion. The fact that the Client may also exercise some degree of control over the Individual does not indicate that the Individual is not an employee. Therefore, in Situation 1, the Individual is an employee of the Firm under the common law rules. The facts in Situation 1 involve an arrangement among the Individual, Firm, and Client, and the services provided by the Individual are technical services. Accordingly, the Firm is denied section 530 relief under section 530(d) of the 1978 Act (as added by section 1706 of the 1986 Act), and no relief is available with respect to any employment tax liability incurred in Situation 1. The analysis would not differ if the acts of Situation 1 were changed to state that the Individual provided the technical services through a personal service corporation owned by the Individual.

In Situation 2, the Firm does not retain any right to control the performance of the services by the Individual and, thus, no employment relationship exists between the Individual and the Firm.

In Situation 3, the Firm does not control the performance of the services of the Individual, and the Firm has no right to affect the relationship between the Client and the Individual. Consequently, no employment relationship exists between the Firm and the Individual.

HOLDINGS

SITUATION 1. The Individual is an employee of the Firm under the common law rules. Relief under section 530 of the 1978 Act is not available to the Firm because of the provisions of section 530(d).

SITUATION 2. The Individual is not an employee of the Firm under the common law rules.

SITUATION 3. The Individual is not an employee of the Firm under the common law rules.

Because of the application of section 530(b) of the 1978 Act, no inference should be drawn with respect to whether the Individual in Situations 2 and 3 is an employee of the Client for federal employment tax purposes.

Rev. Rul. 87-41, 1987-1 C.B. 296

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Form **SS-8**

(Rev. May 2014)

Department of the Treasury
Internal Revenue Service

Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

▶ Information about Form SS-8 and its separate instructions is at *www.irs.gov/formss8.*

OMB. No. 1545-0004

For IRS Use Only:
Case Number:

Earliest Receipt Date:

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name	Firm's email address	Worker's daytime telephone number	Worker's email address
Firm's fax number	Firm's website	Worker's alternate telephone number	Worker's fax number
Firm's telephone number (include area code)	Firm's employer identification number	Worker's social security number	Worker's employer identification number (if any)

Note. If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer. ▶ ----------

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* in the separate instructions for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I–V. All filers of Form SS-8 must complete all questions in Parts I–IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or worker's name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.

Part I General Information

1 This form is being completed by: ☐ Firm ☐ Worker; for services performed ________ (beginning date) to ________ (ending date).

2 Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get workers' compensation benefits, or you were audited or are being audited by the IRS). ----------

3 Total number of workers who performed or are performing the same or similar services: ________.

4 How did the worker obtain the job? ☐ Application ☐ Bid ☐ Employment Agency ☐ Other (specify) ________

5 **Attach copies of all supporting documentation (for example, contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements or IRS rulings).** In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue $ ________.
If both Form W-2 and Form 1099-MISC were issued or received, explain why. ----------

6 Describe the firm's business. ----------

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 16106T Form **SS-8** (Rev. 5-2014)

Part I General Information (continued)

7 If the worker received pay from more than one entity because of an event such as the sale, merger, acquisition, or reorganization of the firm for whom the services are performed, provide the following: Name of the firm's previous owner:

Previous owner's taxpayer identification number: Change was a: ☐ Sale ☐ Merger ☐ Acquisition ☐ Reorganization

☐ Other (specify)

Description of above change:

Date of change (MM/DD/YY):

8 ~~Describe the work done by the worker and provide the worker's job title.~~

9 Explain why you believe the worker is an employee or an independent contractor.

10 Did the worker perform services for the firm in any capacity before providing the services that are the subject of this determination request?

☐ **Yes** ☐ **No** ☐ **N/A**

If "Yes," what were the dates of the prior service?

If "Yes," explain the differences, if any, between the current and prior service.

11 If the work is done under a written agreement between the firm and the worker, attach a copy (preferably signed by both parties). Describe the terms and conditions of the work arrangement.

Part II Behavioral Control (Provide names and titles of specific individuals, if applicable.)

1 What specific training and/or instruction is the worker given by the firm?

2 How does the worker receive work assignments?

3 Who determines the methods by which the assignments are performed?

4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution?

5 What types of reports are required from the worker? Attach examples.

6 Describe the worker's daily routine such as his or her schedule or hours.

7 At what location(s) does the worker perform services (for example, firm's premises, own shop or office, home, customer's location)? Indicate the appropriate percentage of time the worker spends in each location, if more than one.

8 Describe any meetings the worker is required to attend and any penalties for not attending (for example, sales meetings, monthly meetings, staff meetings).

9 Is the worker required to provide the services personally? . . . . ☐ **Yes** ☐ **No**

10 If substitutes or helpers are needed, who hires them?

11 If the worker hires the substitutes or helpers, is approval required? . . . . ☐ **Yes** ☐ **No**

If "Yes," by whom?

12 Who pays the substitutes or helpers?

13 Is the worker reimbursed if the worker pays the substitutes or helpers? . . . . ☐ **Yes** ☐ **No**

If "Yes," by whom?

Part III Financial Control (Provide names and titles of specific individuals, if applicable.)

1 List the supplies, equipment, materials, and property provided by each party:
The firm:
The worker:
Other party:

2 Does the worker lease equipment, space, or a facility? ☐ Yes ☐ No
If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.)

3 ~~What expenses are incurred by the worker in the performance of services for the firm?~~

4 Specify which, if any, expenses are reimbursed by:
The firm:
Other party:

5 Type of pay the worker receives: ☐ Salary ☐ Commission ☐ Hourly Wage ☐ Piece Work ☐ Lump Sum ☐ Other (specify)
If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount. $

6 Is the worker allowed a drawing account for advances? ☐ Yes ☐ No
If "Yes," how often?
Specify any restrictions.

7 Whom does the customer pay? ☐ Firm ☐ Worker
If worker, does the worker pay the total amount to the firm? ☐ Yes ☐ No If "No," explain.

8 Does the firm carry workers' compensation insurance on the worker? ☐ Yes ☐ No

9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (for example, loss or damage of equipment, material)?

10 Does the worker establish the level of payment for the services provided or the products sold? ☐ Yes ☐ No
If "No," who does?

Part IV Relationship of the Worker and Firm

1 Please check the benefits available to the worker: ☐ Paid vacations ☐ Sick pay ☐ Paid holidays ☐ Personal days ☐ Pensions ☐ Insurance benefits ☐ Bonuses ☐ Other (specify)

2 Can the relationship be terminated by either party without incurring liability or penalty? ☐ Yes ☐ No
If "No," explain your answer.

3 Did the worker perform similar services for others during the time period entered in Part I, line 1? ☐ Yes ☐ No
If "Yes," is the worker required to get approval from the firm? ☐ Yes ☐ No

4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation.

5 Is the worker a member of a union? ☐ Yes ☐ No

6 What type of advertising, if any, does the worker do (for example, a business listing in a directory or business cards)? Provide copies, if applicable.

7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern?

8 What does the worker do with the finished product (for example, return it to the firm, provide it to another party, or sell it)?

9 How does the firm represent the worker to its customers (for example, employee, partner, representative, or contractor), and under whose business name does the worker perform these services?

10 If the worker no longer performs services for the firm, how did the relationship end (for example, worker quit or was fired, job completed, contract ended, firm or worker went out of business)?

Part V **For Service Providers or Salespersons.** Complete this part if the worker provided a service directly to customers or is a salesperson.

1 What are the worker's responsibilities in soliciting new customers?

2 Who provides the worker with leads to prospective customers?

3 Describe any reporting requirements pertaining to the leads.

4 What terms and conditions of sale, if any, are required by the firm?

5 Are orders submitted to and subject to approval by the firm? ☐ Yes ☐ No

~~6 Who determines the worker's territory?~~

7 Did the worker pay for the privilege of serving customers on the route or in the territory? ☐ Yes ☐ No

If "Yes," whom did the worker pay?

If "Yes," how much did the worker pay? $

8 Where does the worker sell the product (for example, in a home, retail establishment)?

9 List the product and/or services distributed by the worker (for example, meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one.

10 Does the worker sell life insurance full time? ☐ Yes ☐ No

11 Does the worker sell other types of insurance for the firm? ☐ Yes ☐ No

If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance %

12 If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation %

13 Is the merchandise purchased by the customers for resale or use in their business operations? ☐ Yes ☐ No

Describe the merchandise and state whether it is equipment installed on the customers' premises.

Sign Here

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

Type or print name below signature. Title ▶ Date ▶

§18-1-1. Definitions.

The following words used in this chapter and in any proceedings pursuant thereto have the meanings ascribed to them unless the context clearly indicates a different meaning:

(a) "School" means the students and teachers assembled in one or more buildings, organized as a unit;

(b) "District" means county school district;

(c) "State board" means the West Virginia Board of Education;

(d) "County board" or "board" means a county board of education;

(e) "State superintendent" means the state superintendent of free Schools;

(f) "County superintendent" or "superintendent" means a county superintendent of schools;

(g) "Teacher" means a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state;

(h) "Service person" or "service personnel," whether singular or plural, means any nonteaching school employee who is not included in the meaning of "teacher" as defined in this section, and who serves the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides. Any reference to "service employee" or "service employees" in this chapter or chapter eighteen-a of this code means service person or service personnel as defined in this section;

(i) "Social worker" means a nonteaching school employee who, at a minimum, possesses an undergraduate degree in social work from an accredited institution of higher learning and who provides various professional social work services, activities or methods as defined by the state board for the benefit of students;

(j) "Regular full-time employee" means any person employed by a county board who has a regular position or job throughout his or her employment term, without regard to hours or method of pay;

(k) "Career clusters" means broad groupings of related occupations;

(l) "Work-based learning" means a structured activity that correlates with and is mutually supportive of the school-based learning of the student and includes specific objectives to be learned by the student as a result of the activity;

(m) "School-age juvenile" means any individual who is entitled to attend or who, if not placed in a residential facility, would be entitled to attend public schools in accordance with: (1) Section five, article two of this chapter; (2) sections fifteen and eighteen, article five of this chapter; or (3) section one, article twenty of this chapter;

(n) "Student with a disability" means an exceptional child, other than gifted, pursuant to section one, article twenty of this chapter;

(o) "Casual deficit" means a deficit of not more than three percent of the approved levy estimate or a deficit that is nonrecurring from year to year; and

(p) "Athletic director" means a person employed by a county board to work in a school's athletic program pursuant to section one-a, article two, chapter eighteen-a of this code.

§18A-1-1. Definitions.

The definitions contained in section one, article one, chapter eighteen of this code apply to this chapter. In addition, the following words used in this chapter and in any proceedings pursuant to this chapter have the meanings ascribed to them unless the context clearly indicates a different meaning:

(a) "School personnel" means all personnel employed by a county board whether employed on a regular full-time basis, an hourly basis or otherwise. "School personnel" is comprised of two categories: Professional personnel and service personnel;

(b) "Professional person" or "professional personnel" means those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee;

(c) "Professional educator" has the same meaning as "teacher" as defined in section one, article one, chapter eighteen of this code. Professional educators are classified as follows:

(1) "Classroom teacher" means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity;

(2) "Principal" means a professional educator who functions as an agent of the county board and has responsibility for the supervision, management and control of a school or schools within the guidelines established by the county board. The principal's major area of responsibility is the general supervision of all the schools and all school activities involving students, teachers and other school personnel;

(3) "Supervisor" means a professional educator who is responsible for working primarily in the field with professional and other personnel in instructional and other school improvement. This category includes other appropriate titles or positions with duties that fit within this definition; and

(4) "Central office administrator" means a superintendent, associate superintendent, assistant superintendent and other professional educators who are charged with administering and supervising the whole or some assigned part of the total program of the countywide school system. This category includes other appropriate titles or positions with duties that fit within this definition;

(d) "Other professional employee" means a person from another profession who is properly licensed and who is employed to serve the public schools. This definition includes a registered professional nurse, licensed by the West Virginia Board of Examiners for Registered Professional Nurses, who is employed by a county board and has completed either a two-year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program;

(e) "Service person" or "service personnel", whether singular or plural, means a nonteaching school employee who is not included in the meaning of "teacher" as defined in section one, article one, chapter eighteen of this code and who serves the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides. Any reference to "service employee" or "service employees" in this chapter or chapter eighteen of this code means service person or service personnel as defined in this section;

(f) "Principals Academy" or "academy" means the academy created pursuant to section two-b, article three-a of this chapter;

(g) "Center for Professional Development" means the center created pursuant to section one, article three-a of this chapter;

(h) "Job-sharing arrangement" means a formal, written agreement voluntarily entered into by a county board with two or more of its employees who wish to divide between them the duties and responsibilities of one authorized full-time position;

(i) "Prospective employable professional person", whether singular or plural, means a certified professional educator who:

(1) Has been recruited on a reserve list of a county board;

(2) Has been recruited at a job fair or as a result of contact made at a job fair;

(3) Has not obtained regular employee status through the job posting process provided in section seven-a, article four of this chapter; and

(4) Has obtained a baccalaureate degree from an accredited institution of higher education within the past year;

(j) "Dangerous student" means a student who is substantially likely to cause serious bodily injury to herself or another individual within that student's educational environment, which may include any alternative education environment, as evidenced by a pattern or series of violent behavior exhibited by the student, and documented in writing by the school, with the documentation provided to the student and parent or guardian at the time of any offense;

(k) "Alternative education" means an authorized departure from the regular school program designed to provide educational and social development for students whose disruptive behavior places them at risk of not succeeding in the traditional school structures and in adult life without positive interventions; and

(l) "Long-term substitute" means a substitute employee who fills a vacant position:

That the county superintendent expects to extend for at least thirty consecutive days, and is either:

(A) Listed in the job posting as a long-term substitute position of over thirty days; or

(B) Listed in a job posting as a regular, full-time position and:

(i) Is not filled by a regular, full-time employee; and

(ii) Is filled by a substitute employee.

For the purposes of section two, article sixteen, chapter five of this code, long-term substitute does not include a retired employee hired to fill the vacant position.

230 W.Va. 242
737 S.E.2d 270

Jan H. CUNNINGHAM and Lynn Cunningham, Plaintiffs Below, Petitioners
v.
HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, Defendant Below, Respondent.

No. 11–0398.

Supreme Court of Appeals of West Virginia.

Submitted May 23, 2012.
Decided Nov. 20, 2012.

[737 S.E.2d 272]

Syllabus by the Court

1. "A circuit court's entry of summary judgment is reviewed *de novo.*" Syllabus point 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. " ' "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1,

[737 S.E.2d 273]

Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992)." Syllabus point 2, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

3. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus point 4, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

4. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus point 3, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

5. " 'To ascertain whether a workman is an employee or an independent contractor each case must be resolved on its own facts and ordinarily no one feature of the relationship is controlling, but all must be considered together.' Syl. pt. 1, *Myers v. Workmen's Compensation Commissioner,* 150 W.Va. 563, 148 S.E.2d 664 (1966)." Syllabus point 2, *Barkley v. State Workmen's Compensation Commissioner,* 164 W.Va. 777, 266 S.E.2d 456 (1980).

6. "One who would defend against tort liability by contending that the injuries were inflicted by an independent contractor has the burden of establishing that he neither controlled nor had the right to control the work, and if there is a conflict in the evidence and there is sufficient evidence to support a finding of the jury, the determination of whether an independent contractor relationship existed is a question for jury determination." Syllabus point 1, *Sanders v. Georgia–Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976).

7. "There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative." Syllabus point 5, *Paxton v. Crabtree,* 184 W.Va. 237, 400 S.E.2d 245 (1990).

fastcase

8. "If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and the determining factor in connection with this matter is not the use of such right of control or supervision but the existence thereof in the person for whom the work is being done." Syllabus point 2, *Spencer v. Travelers Insurance Co.,* 148 W.Va. 111, 133 S.E.2d 735 (1963).

9. "An owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—without changing the relationship from that of owner and independent contractor, or changing the duties arising from that relationship." Syllabus point 4, *Shaffer v. Acme Limestone Co., Inc.,* 206 W.Va. 333, 524 S.E.2d 688 (1999).

10. " 'A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons [or entities] to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.' Syl. pt. 2, *Price v. Halstead,* 177 W.Va. 592, 355 S.E.2d 380 (1987)." Syllabus point 5, *Armor v. Lantz,* 207 W.Va. 672, 535 S.E.2d 737 (2000).

Marvin W. Masters, The Masters Law Firm LC, Charleston, WV, for Petitioners.

Thomas J. Hurney, Jr., Rob J. Aliff, Jennifer M. Mankins, Jackson Kelly PLLC, Charleston, WV, for Respondent.

[737 S.E.2d 274]

PER CURIAM:

In this appeal from an order granting summary judgment in favor of Herbert J. Thomas Memorial Hospital Association (hereinafter referred to as "Thomas Hospital" or "the hospital"), a defendant in the action below, the petitioners, Jan H. Cunningham and Lynn Cunningham (hereinafter collectively referred to as "the Cunninghams"), who are the plaintiffs below, ask this Court to find that certain physicians were employees or actual agents of Thomas Hospital, and therefore, Thomas Hospital may be held vicariously liable for any negligence committed by the physicians pursuant to W. Va.Code § 55-7B-9(g) (2003) (Repl. Vol. 2008). In the alternative, the Cunninghams seek to hold Thomas Hospital vicariously liable under the theory that the various defendants to this lawsuit were engaged in a joint venture. We find no error in the circuit court's award of summary judgment. Therefore, this case is affirmed.

I.
FACTUAL AND PROCEDURAL HISTORY

In April 2007, Dr. Jan Cunningham (hereinafter individually referred to as "Dr. Cunningham") was taken to the Thomas Hospital Emergency Department by his wife, Lynn Cunningham. Dr. Cunningham was suffering from a physical ailment, the details of which are not necessary to our resolution of the issues herein presented. Upon arrival at the hospital, Dr. Cunningham was evaluated by a physician in the Emergency Department and referred to Hossam Tarakji, M.D., a hospitalist [1] and a defendant in this action (hereinafter referred to as "Dr. Tarakji"). Dr. Tarakji admitted Dr. Cunningham [2] into the hospital, and provided care and treatment to Dr. Cunningham during his hospitalization. During a period when Dr. Tarakji was on vacation, Dr. Cunningham received treatment and care from another hospitalist associated with Dr. Tarakji, Thomas J. Rittinger, M.D. (hereinafter referred to as "Dr. Rittinger"), who is also a defendant in this action. Dr. Rittinger arranged for a consultation with a

fastcase

surgeon, Richard A. Fogle, M.D. (hereinafter referred to as "Dr. Fogle"), another defendant in this action. Dr. Fogle performed exploratory surgery within a few days of Dr. Cunningham's admission to the hospital. Following the surgery, Dr. Cunningham developed a serious infection that apparently resulted from the surgery. Dr. Cunningham ultimately required several follow-up surgeries [3] and alleges that he has suffered permanent injury as a result of the infection.

Thereafter, Dr. Cunningham filed the instant medical malpractice action against Thomas Hospital, Dr. Tarakji, Dr. Rittinger, and Dr. Fogle. Also included as defendants in this malpractice action are Hospitalist Medicine Physicians of Kanawha County, PLLC (hereinafter referred to as "Hospitalist Medicine"), and Delphi Healthcare Partners, Inc. (hereinafter referred to as "Delphi"). Doctors Tarakji and Rittinger were employed by Hospitalist Medicine and treated patients exclusively at Thomas Hospital in accordance with a contractual relationship between Thomas Hospital and Hospitalist Medicine. Delphi contracted with Thomas to provide a "surgicalist" program. The parties

[737 S.E.2d 275]

to this appeal represent that the "surgicalist program" was a unique arrangement, similar to a hospitalist program, that provided the hospital with surgeons.[4] Dr. Fogle provided surgical services at Thomas Hospital in accordance with a contract he executed with Delphi.[5] The Cunninghams sought to hold Thomas Hospital vicariously liable for the alleged negligence of Drs. Tarakji, Rittinger and Fogle on the theory that the doctors were employees or actual agents of the hospital, or that the doctors and corporate defendants Delphi and Hospitalist Medicine were engaged in a joint venture with the hospital.

Thomas Hospital initially filed a motion for summary judgment in September 2009. The circuit court denied the motion by order entered on February 1, 2010. Thereafter, on April 23, 2010, Thomas Hospital filed a second motion for summary judgment. In its motion, Thomas Hospital argued that Drs. Tarakji, Rittinger and Fogle were not employees, actual agents, or joint venturers of the hospital. Therefore, Thomas Hospital asserted that there was no viable evidence upon which to hold the hospital vicariously liable for the actions of any of the aforementioned doctors. In addition, on April 29, 2010, Thomas Hospital filed a motion asking the circuit court to reconsider its February 1, 2010, order denying Thomas Hospital's first motion for summary judgment. By order entered February 3, 2011, the circuit court granted Thomas Hospital's motion to reconsider and, in addition, granted summary judgment in favor of Thomas Hospital. In granting summary judgment, the circuit court concluded that, when viewing the evidence in the light most favorable to the Cunninghams, Drs. Tarakji, Rittinger and Fogle were not actual agents or employees of Thomas Hospital at the time of the alleged negligence, and there was no joint venture. It is from this order that the Cunninghams now appeal.

II.
STANDARD OF REVIEW

This case is before this Court for review of an order granting summary judgment to Thomas Hospital. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting this *de novo* review, we recognize that,

> " '[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 2, *Painter,* 192 W.Va. 189, 451 S.E.2d 755. Moreover,

> [s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. pt. 4, *Painter, id.* Finally, we note that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter, id.* With due consideration for the foregoing standards governing our review, we address the issues presented.

III. DISCUSSION

In this action, the Cunninghams seek to hold Thomas Hospital vicariously liable for

[737 S.E.2d 276]

the allegedly negligent actions of the three defendant doctors. With respect to vicarious liability in causes of action for medical malpractice, the West Virginia Medical Professional Liability Act states:

> (g) Nothing in this article is meant to preclude a health care provider from being held responsible for the portion of fault attributed by the trier of fact to any person acting as the health care provider's agent or servant or to preclude imposition of fault otherwise imputable or attributable to the health care provider under claims of vicarious liability. *A health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least one million dollars.*

W. Va.Code § 55–7B–9 (2003) (Repl. Vol. 2008) (emphasis added). In accordance with the foregoing provision, which precludes an ostensible agency theory of vicarious liability,[6] the Cunninghams have argued that Drs. Tarakji, Rittinger and Fogle were actual agents or employees of the hospital, and, therefore, Thomas Hospital may be held vicariously liable for their alleged negligence. In the alternative, the Cunninghams have asserted that the three defendant doctors, along with Delphi and Hospitalist Medical, were involved in a joint venture with Thomas Hospital. We will consider the evidence presented with respect to each of these theories to ascertain whether summary judgment was proper.

A. Actual Agents or Employees

This Court previously has explained that "one must examine the facts of a particular case to determine whether an agency relationship exists." *Arnold v. United Cos. Lending Corp.*, 204 W.Va. 229, 239, 511 S.E.2d 854, 864 (1998). This Court further has clarified that,

> "[t]o ascertain whether a workman is an employee or an independent contractor each case must be resolved on its own facts and ordinarily no one feature of the relationship is controlling, but all must be considered together." Syl. pt. 1, *Myers v. Workmen's Compensation Commissioner*, 150 W.Va. 563, 148 S.E.2d 664 (1966).

Syl. pt. 2, *Barkley v. State Workmen's Comp. Comm'r*, 164 W.Va. 777, 266 S.E.2d 456 (1980). Moreover,

> [o]ne who would defend against tort liability by contending that the injuries were inflicted by an independent contractor has the burden of establishing that he neither controlled nor had the right to control the work, and if there is a conflict in the evidence and there is sufficient evidence to support a finding of the jury, the determination of

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whether an independent contractor relationship existed is a question for jury determination.

Syl. pt. 1, *Sanders v. Georgia–Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976). *See also* Syl. pt. 2, *Goodwin v. Willard,* 185 W.Va. 321, 406 S.E.2d 752 (1991) (per curiam) (" 'When the evidence is conflicting the questions whether the relation of principal and agent existed and, if so, whether the agent acted within the scope of his authority and in behalf of his principal are questions for the jury.' Syl. pt. 2, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894 (1958)."); Syl. pt. 3, *Spencer v. Travelers Ins. Co.,* 148 W.Va. 111, 133 S.E.2d 735 (1963) ("Where the evidence involving an independent contractor or employee is conflicting, or if not conflicting, where more than one inference can be derived therefrom, the question is one of fact for jury determination, but where the facts are such that only one reasonable inference can be drawn therefrom, the question is one of law for the court to decide.").

The "seminal case establishing the test for whether an independent contractor relationship exists is *Paxton v. Crabtree,* 184 W.Va. 237, 400 S.E.2d 245 (1990)."

[737 S.E.2d 277]

Shaffer v. Acme Limestone Co., Inc., 206 W.Va. 333, 340, 524 S.E.2d 688, 695 (1999). The *Paxton* court established that

[t]here are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative.

Syl. pt. 5, *Paxton,* 184 W.Va. 237, 400 S.E.2d 245. Thus, we consider the foregoing elements, with particular attention to the last element, power of control, to determine whether the evidence was in conflict or whether more than one inference could be drawn therefrom. In conducting this analysis, we will consider particular contractual terms that pertain to the elements of the test, while also upholding the established principle that the mere existence of a contract, or the contractual characterization of a relationship as involving an independent contractor, is insufficient to conclusively resolve the true nature of the relationship at issue:

This Court has recognized that the mere fact that work is being done "pursuant to a contract" establishes the independent contractor exception to *respondeat superior,* and that language or terms that may be used to label a business or working relationship—whether in writing or otherwise—are not determinative on the issue of whether an "independent contractor" exception is established for the purpose of relieving an employing party from potential respondeat superior liability. As we stated in *Kirkhart v. United Fuel Gas Co.,* 86 W.Va. 79, 102 S.E. 806 (1920): "[p]roving that the work was being done under a contract does not constitute the defense of independent contractor."

Zirkle v. Winkler, 214 W.Va. 19, 23, 585 S.E.2d 19, 23 (2003) (per curiam).

1. Selection and engagement of the servant. The evidence pertaining to the engagement of Dr. Fogle, and Drs. Tarakji and Rittinger, indicate that they were not hired by Thomas Hospital. Instead, Dr. Fogle was hired by Delphi, and Drs. Tarakji and Rittinger were hired by Hospitalist Medicine.

With respect to Dr. Fogle, the contract between Delphi and Thomas Hospital expressly specified that Delphi would "solicit and recruit qualified physicians." The evidence established that Delphi pre-screened Dr. Fogle and selected him as a candidate to serve their obligation to

fastcase

Thomas Hospital. Dr. Fogle's deposition testimony pertaining to his hiring was as follows:

Q: Did you interview here with somebody at Thomas? How did that come about?

A: It was Delphi, and then Delphi brought me here and brought Doctor Doromal here, and we interviewed with Thomas Hospital.

Thus, Delphi first selected Dr. Fogle and then presented him to Thomas Hospital as a candidate to serve as a surgicalist at the hospital. This process was in accordance with the contractual arrangement between Delphi and Thomas Hospital, which expressly specified that "all physicians recruited by [Delphi] must be approved and accepted by" Thomas Hospital. Accordingly, Thomas Hospital had the opportunity to evaluate Dr. Fogle to determine whether he was a good fit with the hospital. Nevertheless, the evidence before the court at the summary judgment stage clearly established that Dr. Fogle was recruited and hired by Delphi. In other words, to utilize the language of *Paxton,* it was Delphi, and not Thomas Hospital, who was responsible for the "[s]election and engagement" of Dr. Fogle. Syl. pt. 5, *Paxton,* 184 W.Va. 237, 400 S.E.2d 245.

The evidence with respect to Drs. Tarakji and Rittinger was similar. The contract between Thomas Hospital and Hospitalist Medicine expressly provided that Thomas Hospital "shall have the right to approve any [Hospitalist Medicine] Physician or Mid–Level Provider working for [Hospitalist Medicine], which approval shall not be unreasonably withheld, conditioned, or delayed." The evidence establishes that Drs. Tarakji and Rittinger were recruited by Hospitalist Medicine. In this respect, Dr. Tarakji testified by deposition that he was contacted by Hospitalist Medicine and hired by the same. He

[737 S.E.2d 278]

stated that he was not hired by Thomas Hospital. Likewise, Dr. Rittinger, in his deposition, testified that he was first contacted by Hospitalist Medicine to discuss his interest in becoming a hospitalist.

Based upon the foregoing, the evidence regarding the first element of the *Paxton* test presents no factual question. Rather, the evidence demonstrates that Dr. Fogle was recruited and engaged by Delphi, and Drs. Tarakji and Rittinger were recruited and engaged by Hospitalist Medicine. Thus, factor one favors the conclusion that Drs. Fogle, Tarakji and Rittinger were not agents of Thomas Hospital.

2. Payment of compensation. The second element of the *Paxton* test for determining the existence of a master-servant relationship is the payment of compensation. The record evidence shows that Thomas Hospital did not pay compensation to Drs. Fogle, Tarakji or Rittinger. Instead, it is undisputed that Delphi and Hospitalist Medicine were compensated by Thomas Hospital for the services rendered by the physicians to the hospital. Then, Delphi paid Dr. Fogle's compensation and Hospitalist Medicine paid Drs. Tarakji and Rittinger. It also is noteworthy that Thomas Hospital did not bill patients for the services provided by these three physicians, and Thomas Hospital did not pay for the physicians' malpractice insurance. Thus, there is no question of fact with respect to the second element of the *Paxton* test. This factor favors the conclusion that Drs. Fogle, Tarakji and Rittinger were not agents of Thomas Hospital.

3. Power of dismissal. The third element of the *Paxton* test examines the power of dismissal. Pursuant to the contract between Delphi and Thomas Hospital, a physician providing services at the hospital was required to comply with the bylaws, rules and regulations, and policies and procedures of the hospital. Upon the failure of a physician to so comply, said physician would be removed from the "schedule of Physicians providing Services in Hospital." In addition, Thomas Hospital could give notice to Delphi that it deemed the performance of a

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physician to be detrimental to the "health or safety" of the hospital's patients. If Delphi and Thomas did not reach a mutually acceptable resolution within thirty days of such notice, then Delphi was required to replace the physician. There is nothing in this agreement that granted Thomas Hospital the authority to terminate Dr. Fogle's agreement with Delphi. The agreement between Dr. Fogle and Delphi set out the conditions under which that agreement would be terminated.

Similarly, the contract between Hospitalist Medicine and Thomas Hospital provided that the physicians rendering services thereunder, which were Drs. Tarakji and Rittinger, were required to maintain certain fundamental qualifications, as well as other qualifications. If a physician failed to maintain the fundamental qualifications, he or she would no longer be eligible to provide services at Thomas Hospital. Under this circumstance, Hospitalist Medicine would be required to assign another physician to perform the contracted-for services. If the physician failed to maintain the other qualifications, the parties had ninety days in which to reach a mutually agreeable resolution. The failure to reach a resolution would result in the loss of the physician's eligibility to provide services at Thomas Hospital, and Hospitalist Medicine would be required to assign another physician to perform the contracted-for services. There is nothing in this agreement that granted Thomas Hospital the power to dismiss Dr. Tarakji or Dr. Rittinger. To the contrary, the contracts between Hospitalist Medicine and Drs. Tarakji and Rittinger expressly set out the conditions under which the physicians could be terminated.

Accordingly, the third element of the *Paxton* test creates no question of fact and favors the conclusion that Drs. Fogle, Tarakji and Rittinger were not agents of Thomas Hospital.

4. Power of control. As Syllabus point 5 of *Paxton* recognizes, the fourth element of the test, power of control, is the determinative factor in a master-servant relationship analysis. *See also* Syl. pt. 3, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994) ("One of the essential elements of an agency relationship is the existence of some degree of control by the principal over

[737 S.E.2d 279]

the conduct and activities of the agent."); Syl. pt. 2, *Myers v. Workmen's Comp. Comm'r*, 150 W.Va. 563, 148 S.E.2d 664 (1966) ("In determining whether a workman is an employee or an independent contractor, the controlling factor is whether the hiring party retains the right to control and supervise the work to be done."). With regard to the element of control, this Court has held:

> If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and the determining factor in connection with this matter is not the use of such right of control or supervision but the existence thereof in the person for whom the work is being done.

Syl. pt. 2, *Spencer v. Travelers Ins. Co.*, 148 W.Va. 111, 133 S.E.2d 735 (1963). However, the entity engaging an independent contractor is not required to surrender all control in order to maintain an independent contractor relationship.

> An owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—without changing the relationship from that of owner and independent contractor, or changing the duties arising from that relationship.

Syl. pt. 4, *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 524 S.E.2d 688 (1999).

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The Cunninghams cite three cases which they assert represent instances where this Court has applied agency principles in the hospital/physician context and found the hospital to be liable. However, two of these cases are distinguishable from the case *sub judice* because each relied upon the fact that *the hospital* selected the physician and/or insisted that the patient be treated by a particular physician of the *hospital's* choice.[7] In the instant case, there is no evidence that Thomas Hospital insisted that Dr. Cunningham be treated by Drs. Fogle, Tarakji or Rittinger.

The third case cited by the Cunninghams is *Thomas v. Raleigh General Hospital,* 178 W.Va. 138, 358 S.E.2d 222 (1987). *Raleigh General* relied in significant part upon the fact that the hospital had selected the physician (an anesthesiologist); [8] however, the Court also relied on the fact that the doctor was a "manager" of the hospital:

Dr. Carozza held the positions of Director of Respiratory Services and Chief of Anesthesiology at the hospital. The hospital gave him an office and a stipend for these duties. There is a factual question as to whether these duties and compensation would create a relationship where Dr. Carozza was the "manager" of anesthesiology at the hospital. A hospital cannot absolve itself from liability of a treating physician where that physician was a "manager" of the hospital. *See Vaughan v. Memorial Hosp.,* 100 W.Va. 290, 293, 130 S.E. 481, 482 later app., 103 W.Va. 156, 136 S.E. 837 (1925). 178 W.Va. at 141, 358 S.E.2d at 225. The Cunninghams contend that Dr. Fogle was a director of surgery and performed administrative, *i.e.* management, duties on behalf of the hospital. We note, however, that Dr. Fogle's administrative duties were set out in his contract with Delphi and pertained to the surgical program that Delphi had contractually agreed to provide for Thomas Hospital. Furthermore, unlike the doctor in *Raleigh General* who received a stipend from the

[737 S.E.2d 280]

hospital, the additional compensation received by Dr. Fogle for serving as a director was paid by Delphi. Thus, we find the Cunninghams' reliance on *Raleigh General* to be unpersuasive in establishing that Thomas Hospital exercised a level of control over Dr. Fogle such that he was an employee thereof.

Moreover, we have carefully and thoroughly reviewed the record in this case and find no evidence to establish a question of fact with regard to the element of control exercised by the hospital over Drs. Fogle, Tarakji and Rittinger. On the contrary, the evidence is clear that the hospital merely exercised a level of control commensurate with that approved by this Court in *Shaffer v. Acme Limestone Co., Inc.* To reiterate, under *Shaffer,* Thomas Hospital was permitted to exercise "broad general powers of supervision and control as to the results of the work so as to insure satisfactory performance of the contract[.]" Syl. pt. 4, *Shaffer,* 206 W.Va. 333, 524 S.E.2d 688.

Additional evidence relied upon by the Cunninghams to establish control by Thomas Hospital is simply unpersuasive. For example, the Cunninghams assert that Thomas Hospital set the schedules for the three physicians. This assertion is not a correct interpretation of the evidence. Instead, the evidence considered by the circuit court in granting summary judgment demonstrates that Delphi was contractually obligated to provide scheduling services for Dr. Fogle. Similarly, according to the contract between Hospitalist Medicine and Thomas Hospital, Dr. Tarakji, as the on-site medical director, was to "[s]chedule medical coverage by HMP [Hospitalist Medicine] Physicians in accordance with the terms of the Agreement."

The Cunninghams also rely on the fact that Thomas Hospital provided office space and secretarial support to the physicians. We find this evidence inadequate to establish a level of control that would overcome the physicians' independent-contractor status.

The Cunninghams further assert that the doctors were obligated to provide services twenty-four hours per day, seven days per week to the hospital. This was simply a term included in Thomas Hospital's contracts with Delphi and Hospitalist Medicine. Physicians providing the services for which they are contractually obligated does not establish control by the hospital over said physicians.

A final example of the evidence relied upon by the Cunninghams is their contention that Thomas Hospital's control over Dr. Fogle was evidenced by the fact that he was required to work exclusively at the hospital. Notably, however, while there is an exclusivity provision in the Delphi/Thomas Hospital agreement, Dr. Fogle's contract with Delphi contained a "Freedom to Contract" clause that stated "[i]t is agreed that Physician may engage in any other professional activities or business during the term of this Agreement so long as such activities are not inconsistent with and do not conflict with Physician's contractual obligations hereunder." Thus, this evidence does not create a question with regard to Thomas Hospital's control over Dr. Fogle.

Having carefully reviewed the evidence that was before the circuit court when it ruled on Thomas Hospital's summary judgment motion, and having considered that evidence in light of the factors set out by this court in *Paxton,* we agree with the circuit court's conclusion that Drs. Fogle, Tarakji and Rittinger were not agents or employees of Thomas Hospital. Therefore, we affirm the circuit court's award of summary judgment with respect to the Cunningham's vicarious liability theory.

B. Joint Venture

As an alternate theory, the Cunninghams contend that Thomas Hospital was vicariously liable for the actions of the defendant physicians insofar as they were engaged in a joint venture.

"A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons [or entities] to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract

[737 S.E.2d 281]

may be oral or written, express or implied." Syl. pt. 2, *Price v. Halstead,* 177 W.Va. 592, 355 S.E.2d 380 (1987).

Syl. pt. 5, *Armor v. Lantz,* 207 W.Va. 672, 535 S.E.2d 737 (2000). In addition,

[w]e have noted that, intrinsic to a joint venture, is the concept of mutual efforts to promote the business, the success of which would accrue to the benefit of all parties:

To constitute a joint adventure the parties must combine their property, money, efforts, skill, or knowledge, in some common undertaking of a special or particular nature, but the contributions of the respective parties need not be equal or of the same character. There must, however, be some contribution by each party of something promotive of the enterprise.

Pownall v. Cearfoss, 129 W.Va. 487, 497–498, 40 S.E.2d 886, 893 (1946) (citation omitted).

Sipple v. Starr, 205 W.Va. 717, 725, 520 S.E.2d 884, 892 (1999) (finding genuine issues of material fact existed as to whether fuel distributor, convenience store, and store owner engaged in a joint venture).

The Cunninghams assert that the various contracts among Thomas Hospital, Delphi, Hospitalist Medicine and the three defendant physicians were for the sole purpose of providing medical services at Thomas Hospital for a profit.

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The Cunninghams also direct the Court's attention to the following:

> [T]he United States Court of Appeals for the First Circuit has held that when a hospital grants staff privileges to a physician and shares in the profits earned by that physician at the hospital, the hospital is also responsible for acts of malpractice committed by the physician. *Suárez Matos v. Ashford Presbyterian Community Hosp.*, 4 F.3d 47, 52 (1st Cir.1993) (emphasis added). In that situation, as [a] matter of law the hospital is a joint actor in a joint enterprise. *Id.*

Pages–Ramirez v. Hospital Espanol Auxillo Mutuo De Puerto Rico, Inc., 547 F.Supp.2d 141, 151 (D.Puerto Rico 2008).

Thomas Hospital responds that " '[p]ossibly the most important criterion of a joint venture is joint control and management of the property used in accomplishing its aims.' *Barton v. Evanston Hosp.*, 159 Ill.App.3d 970, 974, 111 Ill.Dec. 819, 513 N.E.2d 65, 67 (1987) (citation omitted)." *Armor v. Lantz*, 207 W.Va. 672, 680, 535 S.E.2d 737, 745 (2000). Thomas Hospital argues that there was no joint venture in this instance because Thomas Hospital did not have the right to control the physicians in their provision of medical treatment, and, likewise, the physicians and corporations (Delphi and Hospitalist Medicine) did not have the right to control Thomas Hospital when it came to hospital functions or property.

The *Armor v. Lantz* Court went on to state:

> Importantly, "[t]he control required for imputing negligence under a joint enterprise theory is not actual physical control, but the legal right to control the conduct of the other with respect to the prosecution of the common purpose." *Slaughter v. Slaughter*, 93 N.C.App. 717, 721, 379 S.E.2d 98, 101 (1989) (citation omitted).

Armor, 207 W.Va. at 680, 535 S.E.2d at 745.

The circuit court found, as a matter of law, that

> the Plaintiffs cannot prove the essential element of "joint venture", i.e., they cannot prove that Thomas Memorial Hospital exercised the right to control the defendant physicians' practice of medicine. Similarly, there is no evidence that the other defendants had the right to control the Hospital's practices with respect to its business. As such, the theory of joint venture cannot provide an independent basis for liability against Thomas Memorial Hospital.

We find no error in this conclusion and, therefore, affirm the circuit court's summary judgment on the issue of a joint venture.

IV. CONCLUSION

For the reasons stated in the body of this opinion, we find the Circuit Court of Kanawha County did not err in granting summary judgment in favor of Thomas Hospital based

[737 S.E.2d 282]

upon the circuit court's conclusion that Drs. Fogle, Tarakji and Rittinger were not agents or actual employees of Thomas Hospital. We further find that the circuit court did not err in concluding that Thomas Memorial was not engaged in a joint venture with the other defendants to this action. Accordingly, the circuit court's order of February 3, 2011, is affirmed.

Affirmed.

Justice McHUGH, deeming himself disqualified, did not participate.
Judge WILKES, sitting by temporary assignment.

Notes:

1. A "hospitalist" is defined as

1. A physician whose professional activities are performed chiefly within a hospital (e.g., anesthesiologist, emergency department physician, intensivist (intensive care specialist), pathologist, and radiologist).... 2. A primary care physician (not a house officer) who assumes responsibility for the observation and treatment of hospitalized patients and returns them to the care of their physicians when they are discharged from the hospital.

Stedman's Medical Dictionary for the Health Professions and Nursing 731 (6th ed. 2008). *See also Dorland's Illustrated Medical Dictionary* 884 (31st ed. 2007) (defining "hospitalist" as "[a] physician specializing in hospital inpatient care"); *Mosby's Medical Dictionary,* 902 (7th ed. 2006) (same).

2. In the course of the admission process, Dr. Cunningham and his wife executed certain admission papers. One of those papers, titled "Authorization for Care," included the statement that "I understand that most of the physicians on the staff of this hospital are not employees or agents of the hospital, but rather, are independent contractors who have been granted the privilege of using the hospital's facilities for the care and treatment of the physician's patients."

3. The follow-up surgeries were not performed by Dr. Fogle.

4. The parties represent that the surgicalist program at Thomas Hospital was the first program of its type in the United States.

5. Additional details regarding the various contracts and employment relationships between Thomas Hospital and the remaining defendants will be discussed in our analysis of the issues raised in this appeal. See *infra* Section III of this opinion titled "Discussion."

6. It has been represented by Thomas Hospital that each of the defendant doctors had at least one million dollars of professional liability insurance coverage at the time relevant to this lawsuit. The Cunninghams do not dispute this assertion.

7. *See* Syl. pt. 1, *Vaughan v. Mem'l Hosp.,* 100 W.Va. 290, 130 S.E. 481 (1925) ("A hospital conducted for private gain is liable to its patient for injuries sustained by him in consequence of incompetency or negligence of a physician *treating him at its instance,* under a contract to furnish him proper treatment." (emphasis added)); *Jenkins v. Charleston Gen. Hosp. & Training Sch.,* 90 W.Va. 230, 110 S.E. 560 (1922) (same).

8. *See* Syl. pt. 2, *Thomas v. Raleigh Gen. Hosp.,* 178 W.Va. 138, 358 S.E.2d 222 (1987) ("Where a patient goes to a hospital seeking medical services and is forced to rely on the hospital's choice of physician to render those services, the hospital may be found vicariously liable for the physician's negligence.").

Bowles Rice

Attorneys at Law

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