

INDEPENDENT CONTRACTOR

Are sports officials independent contractors or employees? Who cares?

You should! Your status as either will determine a lot of what happens if you're ever injured while officiating or sued because of your officiating. That's not even to mention questions the Internal Revenue Service may have for you.

For most, officiating is a pleasant yet challenging way of life — a second job, a complex and demanding hobby, or in some cases, a significant supplement to your income. In all cases, however, officiating is, or should be, a significant supplement to your catalog of achievement. Officials enjoy contact with the game and it doesn't hurt that we are financially rewarded — however inadequately (but that's a topic for another time) — for our services.

What happens, though, if we are injured "on the job"? What if somebody claims we committed "official malpractice" and caused injury to an athlete, coach or spectator? What are the obligations of the commissioner, association or conference that engages us or assigns games? What happens when a legal claim or obligation arises?

When the conversation rolls around to legal concerns, inevitably



or EMPLOYEE?

BY ALAN GOLDBERGER



someone — a voice in the back of the room at your local association meeting — will reassure his brothers and sisters, “We are independent contractors!” Is such a statement, if true, a comfort or a warning? Are officials always independent contractors? Or can we be employees? Why does it matter? Does either label solve all our legal problems?

Truth be told, aside from professional sports, the nature of the officiating profession in the U.S. is such that the “job description” for officials, and the practice of sports organizations, simply does not fit the traditional analyses used by courts and government agencies to declare all sports officials employees or all sports officials independent contractors, period.

Still, while many officiating relationships around the country have similar characteristics, the determination of an official’s status — as an independent contractor or employee — is not necessarily controlled by any one factor. So if you’re looking for the definitive answer to the question of whether referees are independent contractors or employees, you can stop looking. There isn’t one. The better question, and the one that could potentially impact you personally, is, “Who wants to know?”

Why Isn’t It Clear Cut?

Generally speaking, the most important factor in determining whether any person is an employee or an independent contractor is whether the employer has the right to control the means and method by which the worker performs his or her work.

Thus, officials who are “set up” in a trade, who work on their own, with their own equipment and attire, and whose services are rendered in a variety of places and on a sporadic or irregular basis, are more likely to be considered independent contractors than employees.

Sounds a lot like your run-of-the-mill referee or umpire, doesn’t it?

Sports officials often are independently trained, provide their own uniforms and equipment, work in different venues every night, are responsible for their own expenses and costs of uniforms, equipment, transportation and continuing education. Most officials, therefore, better fit the “independent contractor” definition. In many cases, though, officials associations and other sports organizations may exercise more control over officiating programs by assigning and paying officials, restricting their officiating activities and requiring rigid adherence to off field conduct. Those methods of engaging officials are more akin to making officiating a “job” for which employees are hired.

That’s why sports officials have always been in a sort of “gray area” when it comes to their status as either independent contractors or employees. Unlike, say, a roofer, whose status as an independent contractor is very clear, sports officials operate independently in some ways and in others, they don’t.

Like it or not, the classification of officials as either independent contractors or employees is largely determined by government agencies, courts, state laws, administrative regulations and contractual arrangements — each with their own purpose, and often conflicting.

What officials need to remember is that the independent contractor or employee determination always needs to be viewed in the context of the legal situation presented. The distinction can be of critical importance and the answer may differ depending on whether the inquiry is the result of:



A government agency that administers state or local labor laws



A workers’ compensation court



A state or local taxing authority



The Internal Revenue Service



A state or federal civil rights or labor law entity



A court hearing a lawsuit involving an official

What Do the Courts Have to Say?

While courts in many states have held that officials seeking workers’ compensation benefits as employees are independent contractors, a few courts have, on occasion, decided that some officials are employees. In other states, the legislatures have acted, declaring certain officials to be independent contractors. None of those cases or legislative actions, however, necessarily decides the issue for all purposes and all jurisdictions.

For example, when officials seek benefits under workers’ compensation laws, which regulate the rights of employees to be compensated for injuries occurring on the job, state law often provides an answer to the question.

A recently enacted Florida statute, for example, indicates that an official working a school or private non-profit organization-sponsored athletic event is not to be deemed an employee.

Some laws are even more specific. Oregon, for example, indicates that any referee or assistant referee in a youth or adult recreational soccer match shall be considered to be an independent contractor.

In the state of Washington, the attorney general has issued a ruling that officials working interscholastic sports are covered by the workers’ compensation laws.

Minnesota lists an eight-part test to determine whether a sports official is an employee or an independent contractor. In Minnesota, officials will be deemed independent contractors if (1) a written contract exists stating that the official is an independent contractor; (2) fees are paid on a per-game basis; (3) the official, under his or her contract, can accept or reject any game assignment; and (4) the official is not limited to exclusively officiating with the party assigning the official. On the other hand, officials in Minnesota will be deemed employees if they are paid on an hourly, weekly or other time basis; are required to work where and when they are assigned and cannot reject assignments; cannot officiate for other organizations; and the official can be terminated at any time.

How Do Contracts, Taxes and Game Fees Play Into the Equation?

Officials often find themselves in a variety of legal and contractual relationships when they work. The “employer” most often dictates whether certain persons are employees by its actions. A school, for example, that withholds employment taxes and other contributions from officials’ pay may assume many of the responsibilities that an employer has to its employees. Employees are often entitled to workers’ compensation, unemployment and disability benefits under appropriate circumstances, all of which are contributed to directly or indirectly by the employer. Employees generally have the right to expect a reasonably safe workplace and compliance by the employer with laws governing labor and the employee-employer relationship. Employees can organize into unions for the purpose of collective bargaining.

Independent contractors may have other, albeit different rights. In theory, an official who is injured while working may bring a lawsuit for negligence against a school, league or officials association if he or she is an independent contractor. Employees are generally limited to the more modest remedy of workers’ compensation for such claims.

Employers are responsible for the bulk of government tax reporting and contribution requirements. Employers must comply

with labor laws, maintain workers' compensation insurance, fund unemployment and disability claims and defend their employees against liability claims.

Officials who wince at the prospect of having to keep track of income taxes withheld and an extra W-2 from their "second job" often do not appreciate the fact that being an employee carries advantages as well. In certain instances, employees are covered under liability insurance policies provided by their "employer." In our litigious society, having an extra layer of insurance coverage and being an employee of a "deeper pocket" is not without its decided advantages.

Finally, association officers, take note: If the officials working in an association are made employees of school boards, leagues, conferences or town or county recreation departments, they are less likely to be considered employees of their officials associations. That in turn places a reduced financial burden on officials associations and decreases the possibility that such associations will be liable for any negligence claims against officials.

Why Aren't High School Officials Clearly Considered Independent Contractors?

Alas, even within the arena of high school officiating, in which the most frequent species of officiating animal is of the independent contractor variety, variations exist:

Subjective classification. The independent high school whose business administrator insists on classifying everyone who does not bid for contracts as an employee probably ships all payment details for sports schedules to the pile labeled "payroll." In that scenario, all officials are paid as employees and, as a result, will be considered employees for tax purposes — and may well be considered employees for other purposes.

Postseason payroll syndrome. In some states, officials who work postseason play may be compensated by a state high school association or other umbrella group that classifies officials — or has had officials classified for them by a taxing authority — as employees.

Busmen's holiday. In some cities, officials whose "day job" involves working for a school system or local government may find that working as an official in his or her free time simply adds to the paycheck because the school district or municipality considers anyone on its payroll an employee forever, even if the daytime employee is working after hours as a referee for some related entity.

"How about if we give you one check for the season?" More than one officials association has been caught drowning in the high muddy waters of accepting funds from leagues, recreation departments and school systems for payment of game fees. That deadly exercise cements the perception that the recreation department, the school or the league has hired a "company" that employs officials. That is a particularly neat risk management tool for the schools, the leagues and the recreation departments — often used to demonstrate the fact that officials who are defendants in lawsuits are not the employees and ergo not the legal responsibilities of the leagues or schools, but rather their actions are chargeable against their *real* employers: their officials association. Any associations whose officers are naive enough to supply nourishment to that feeding frenzy are doing a poor job of managing risk for their members. Tax consequences aside, the liability exposure is enormous.

IF IT LOOKS LIKE A DUCK AND QUACKS LIKE A DUCK ...

9 INDEPENDENT CONTRACTOR QUESTIONS

- 1 How are officials assigned?** If they have some say in which assignments they take or reject, they look more like independent contractors.
- 2 How are they paid? When? By whom? Taxes? Deductions?** As detailed in the main article, associations take on a huge liability risk when they take on the responsibilities of cutting game fee checks.
- 3 Is an official free to reject an assignment?** That's one of the biggest factors in determining independent contractor or employee. An independent plumber can choose to accept or reject any job he wants to, but the building custodian at a school or business must fix the toilet whether he wants to or not.
- 4 Does the assigner/employer have the right to control the manner in which the official performs?** We all go by the same rulebooks, but the more control you exert on how an official officiates, the more it looks like you employ that official.
- 5 What are the operating procedures of the association?** In total, take a good hard look to see what sort of restrictions and requirements you put on the members of your association. There has to be some uniformity in any association, but a more "hands off" approach helps define an independent contractor relationship.
- 6 Do the association's bylaws speak to the issue (directly or indirectly)?** It won't necessarily make it true to have some wording describing the member officials as independent contractors, but it might help if it ever becomes an issue.
- 7 Are there contracts or written guidelines between the league and officials association involved?** Look for language that describes the relationship or that addresses anything that would accurately define the relationship as independent contractor or employee.
- 8 Are there league rules concerning officiating and/or modifications to playing rules that relate to officials?** Such things speak to how much control is asserted on how officials do their jobs.
- 9 Are there laws, administrative regulations or prior agency rulings?** Do some research in your state, and even nationally, to stay current on the topic. A good starting point is the NASO website's legislation page (www.naso.org/legislation/).



JEFF BLANKEN HIXON, TN, BY ED PURCELL

How Can Local Associations Impact an Official's Status?

If your officials association has a long-standing practice of taking in game fees, ask yourselves this question: What school board, rec department, league or conference wouldn't like to have a fully staffed "company" that supplies referees and, at the same time, takes care of all the expense and administrative details of paying, supervising, tax reporting and withholding, workers' compensation, unemployment, working conditions and other laws that apply to employers?

Wait a minute. Your officials association is not an employer, you say? Maybe not, but when your association treats its members as an employer treats employees, that very impression may well be conveyed to:

- ▶ ***A jury hearing the lawsuit of an injured athlete suing a referee — an employer is legally liable for many actions of an employee.***
- ▶ ***The Internal Revenue Service — which may be looking for withholding taxes, social security contributions and the like.***
- ▶ ***The state tax department — which may be looking for withholding disability and unemployment contributions from the "employer."***
- ▶ ***The workers' compensation court — on-the-job injuries often end up in this court.***
- ▶ ***Government agencies that administer labor laws — employees have rights that independent contractors may not.***
- ▶ ***Government agencies that administer civil rights laws — anti-discrimination laws that apply specifically to employers.***

Should the association be considered the employer of its member referees or umpires, it may be legally and financially responsible for their work, their mistakes, their tax situation, their entitlement to whatever employees are entitled to under local law, etc. By contrast, the school, league, board of education or other entity has a virtual free ride — all the luxury of "outsourcing" the officiating function — with none of the liability. What better situation could there be for a league, conference, school board or organization that sponsors an athletic program?

Given the fee scale for most high school and rec officials, what worse situation could there be for a non-profit, dues supported officials association that elects to saddle itself with all of the liabilities associated with being an employer of officials, without deriving any benefit, monetary or otherwise, for its efforts.

Unless your officials association is willing to assume all of the many and varied legal and financial obligations of being an employer of officials, taking game fees is risky business, to be sure.

A final note on association management and the independent contractor: Do not assume your officials association's officers or other workers are independent contractors simply because your group issues 1099 forms to those folks. With non-profit organizations under increased government scrutiny of late, even the time-honored tradition of the "secretary's honorarium" may be under fire! Those officials associations that compensate the hardworking stalwarts of the group who maintain the membership rolls, collect the dues or perform other tasks, will want to have their tax advisor guide them regarding the tax rules for paying those who do the association's work.

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What About College-Level Officials?

As you might expect, college officials, often working under much closer supervision and stricter performance guidelines than their high school counterparts, may be more likely to be considered employees. It is therefore no surprise that a vintage ruling of the Internal Revenue Service from 1957 described a college conference officiating structure and ruled that officials working for that conference were, in fact, employees for purposes of federal income taxation.

Contrarily, in the 1987 case of *Collegiate Basketball Officials Association v. National Labor Relations Board*, the Philadelphia-based U.S. Court of Appeals for the Third Circuit, in a “close” decision, upheld a determination of the National Labor Relations Board that the member officials of the CBOA were independent contractors, under the facts presented. As such, the officials’ organization was not a union and could not maintain a claim against a college conference for “unfair labor practices” under a federal law prohibiting such practices. In arriving at that conclusion, the court considered such factors as the CBOA rating system, the fact that officials are paid by the home college for each game, without deduction for payroll type taxes (with the exception of one team), CBOA’s contract to supply “independent contractor” officials to the Eastern College Basketball Association, the officials’ ability to turn back games and close dates at certain times, officials’ mandatory clinics, the fact that officials buy their own uniforms and equipment, and finally, the uniqueness of the officials’ skills.

While most college conferences take the position that officials on their roster are in fact independent contractors and so indicate in their officials’ contracts, the issues are far from settled.

So What Am I?

Historically, officials working in the amateur ranks are often free to work where and when they choose, limited only by the associations and staffs they join, and the contracts they sign. If an official chooses not to be an employee, he or she need not officiate in a league or for a school that makes officials employees. Instead, the officials can work only as independent contractors, but overall, the advantages of doing so are minimal. Income from officiating, whether you’re an employee or an independent contractor, is compensation. It’s all taxable. Employers must comply with all labor and tax laws that apply to their manner of operation and location. Thus, for officials associations, the risks of being an employer generate a cost of doing business. Those costs are borne by the officials whose dues support the association.

At the end of the day, it should be clear that, when speaking of officials as independent contractors or employees, nothing is clear. Although many more amateur officials than not are, for most purposes, independent contractors, each situation must be determined on its own merits.

Alan Goldberger is an attorney and official from Clifton, N.J., who wrote the book, *Sports Officiating: A Legal Guide*. □

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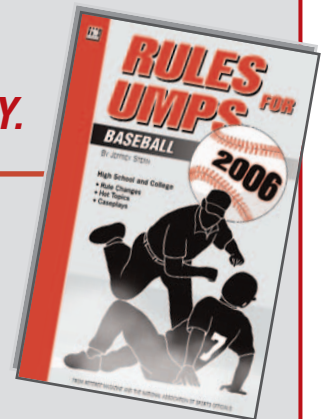
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