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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 2.5@ WITHHOLDING TAX ON WAGES

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Chapter 1@ GENERAL PROVISIONS

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Section 4304-4@ Specific Application of Rules for Determination of Employment Status to Circumstances in the

4304-4 Specific Application of Rules for Determination of Employment Status to Circumstances in the Computer Services Industry

(a)

The common law rules used to determine whether services are performed as an employee or an independent contractor are contained in Section 4304-1. That section provides that "the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists." The purpose of this Section 4304-4 is to provide the computer services industry standards to be used to determine whether the principal has the right to control the manner and means of accomplishing a desired result. The factors contained in this Section 4304-4 are indicators of the right to control. Not all applications listed in this section are necessary to make a determination that a particular relationship exists. A determination of whether services are being performed as an employee or independent contractor will depend upon a grouping of factors that are significant in relationship to the services being performed.

(b)

A "computer consultant" is an individual who performs various computer-related services, including, but not limited to: (1) Development and design of hardware,

software or firmware; (2) Technical leadership and advice in computer-related services; (3) Programming for computer applications; (4) Developing and writing system procedures; (5) System design; (6) Maintenance of software; (7) Training of staff in computerized systems and other computer applications; (8)

Computer-related technical writing. Definition: "Computer-related technical writing," means translating computer-related data, information or promotional material into understandable language for the purpose of technology or information transfer, e.g. writing, editing, preparing or developing written or computer generated publications, manuals, run books, listing, articles, brochures, requests for quotes (RFQs), requests for proposals (RFPs), written works relating to computer hardware, firmware, software, programs, systems design and analysis, operations and procedures associated with computer related services or products.

(1)

Development and design of hardware, software or firmware;

(2)

Technical leadership and advice in computer-related services;

(3)

Programming for computer applications;

(4)

Developing and writing system procedures;

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(c)

A "broker" is an individual or firm that refers a computer consultant to a principal and often pays the computer consultant after payment to the broker by the principal of an amount including a broker's fee, whether or not identified as a fee.

(d)

A "principal" is an individual or entity for whom or which the computer consultant performs services.

(e)

When a computer consultant performs services as a computer consultant of a separately established business entity, regardless of the entity's form, such as individual, joint venture, partnership, association, trust, estate, joint stock company, or corporation whether domestic or foreign, that is registered with the Employment Development Department, that is in the trade or business of providing computer consulting services, and when payments for services are made to that separate business entity and not to the computer consultant directly, and the business entity reports to the Department as wages all payments to consultants performing services to carry out or otherwise satisfy a contract for

computer consulting services entered into by the business entity, then there is a rebuttable presumption that the computer consultant is an employee of the business entity and not an employee of the broker or principal. If the business entity is a corporation it will not be considered "separately established" for the purpose of this regulation unless it has filed Articles of Incorporation with the Secretary of State, if it is a domestic corporation, or complied with the provisions of Title 1, Division 1, Chapter 21 (commencing with Section 2100) of the California Corporations Code, if it is a foreign corporation, and unless it also functions as a corporation by doing all of the following: (1) Has a current Statement of Officers on file with the Secretary of State; (2) Has Board of Directors' meeting at least once a year; (3) Maintains minutes of its Board of Directors' meetings; (4) Files Corporation tax returns; (5) Has a separate corporation bank account which is not co-mingled with the personal funds of any member of the Board of Directors' or any officer of the Corporation; and (6) Contracts to do business as a corporation.

(1)

Has a current Statement of Officers on file with the Secretary of State;

(2)

Has Board of Directors' meeting at least once a year;

(3)

Maintains minutes of its Board of Directors' meetings;

(4)

Files Corporation tax returns;

(5)

Has a separate corporation bank account which is not co-mingled with the personal funds of any member of the Board of Directors' or any officer of the Corporation; and

(6)

Contracts to do business as a corporation.

(f)

If a determination is made that a computer consultant is an employee and his or her services were offered to a principal by a broker, then Section 606.5 of the Code must be applied to determine whether the correct employer of that consultant is the broker or the principal.

(g)

Each of the following secondary factors is an indication that a computer consultant is an employee. When the factors are considered, a determination of whether the individual is an employee will depend on a grouping of factors that are significant in relation to the services being performed. If a computer consultant is reported as an employee to either the federal or state government, the computer consultant is presumed to be an employee for those services.(1) The computer consultant does not have a separately established occupation or business (See subdivision (i)(2)); (2) The skill and services of a computer consultant are similar to those provided by the principal's employees; (3) The services are performed upon the premises of the principal, the computer consultant uses the facilities of the principal and the principal has the right to require compliance with policies or regulations for the conduct of workers on its premises. However, rules that are only for the general safety or security of the premises or facilities, national security, or to prevent industrial espionage and which do not relate to the manner and means of performing the services in question, are not evidence that the computer consultant is an employee (See subdivision (i)(3)); (4) The computer consultant has use of office facilities and staff support services to the same or similar extent as recognized employees (See subdivision (i)(3)); (5) The computer consultant has a continuing exclusive relationship with the principal (See subdivision (i)(4)); (6) The

principal provides fringe benefits to the computer consultant which are similar to those furnished to recognized employees. Fringe benefits include items such as paid vacations, health insurance and pension plans (See subdivision (i)(6)); (7) The computer consultant provides services on an ongoing basis which are part of the regular business of the principal (See subdivision (i)(7)); (8) The parties believe they are creating an employer and employee relationship (See subdivision (i)(8)); (9) The principal has the right to instruct the computer consultant to perform services other than to specify a desired result contemplated in the agreement to perform services (See subdivision (i)(8)).

(1)

The computer consultant does not have a separately established occupation or business (See subdivision (i)(2));

(2)

The skill and services of a computer consultant are similar to those provided by the principal's employees;

(3)

The services are performed upon the premises of the principal, the computer consultant uses the facilities of the principal and the principal has the right to require compliance with policies or regulations for the conduct of workers on its premises. However, rules that are only for the general safety or security of the premises or facilities, national security, or to prevent industrial espionage and which do not relate to the manner and means of performing the services in question, are not evidence that the computer consultant is an employee (See subdivision (i)(3));

(4)

The computer consultant has use of office facilities and staff support services to the same or similar extent as recognized employees (See subdivision (i)(3));

(5)

The computer consultant has a continuing exclusive relationship with the principal (See subdivision (i)(4));

(6)

The principal provides fringe benefits to the computer consultant which are similar to those furnished to recognized employees. Fringe benefits include items such as paid vacations, health insurance and pension plans (See subdivision (i)(6));

(7)

The computer consultant provides services on an ongoing basis which are part of the regular business of the principal (See subdivision (i)(7));

(8)

The parties believe they are creating an employer and employee relationship (See subdivision (i)(8));

(9)

The principal has the right to instruct the computer consultant to perform services other than to specify a desired result contemplated in the agreement to perform services (See subdivision (i)(8)).

(h)

Each of the following secondary factors is an indication that a computer consultant is self-employed. When the factors are considered, a determination of whether an individual is an independent contractor will depend on a grouping of factors that are significant in relation to the services being performed. (1) The computer consultant has a separately established occupation or business (See subdivision (i)(2)); (2) The skill and services of a computer consultant are unique to the work environment. The principal does not have employees available who are capable of performing the services which are provided by the computer consultant; (3) The

services are not performed on the premises of the principal or any other specified premises. For those services which can be performed only on the principal's premises, the computer consultant has the right to use the facilities of the principal but is not required to use the equipment nor comply with policies or regulations of the principal (See subdivision (i)(3)); (4) The computer consultant does not have use of office facilities and staff support services to the same or similar extent as recognized employees (See subdivision (i)(3)); (5) The computer consultant does not have a continuing relationship with the principal. The relationship is of short duration or for a single transaction (See subdivision (i)(4)); (6) The principal does not provide fringe benefits to the computer consultant which are similar to those furnished to recognized employees. Fringe benefits include items such as paid vacations, health insurance and pension plans (See subdivision (i)(6)); (7) The computer consultant is providing services which are not within the regular business purpose of the principal (See subdivision (i)(7)); (8) The parties believe they are creating an independent contractor relationship (See subdivision (i)(8)); (9) The principal does not have the right to instruct the computer consultant in the performance of his or her services other than to specify a desired result contemplated in the agreement to perform services (See subdivision (i)(8)).

(1)

The computer consultant has a separately established occupation or business (See subdivision (i)(2));

(2)

The skill and services of a computer consultant are unique to the work environment. The principal does not have employees available who are capable of performing the services which are provided by the computer consultant;

(3)

The services are not performed on the premises of the principal or any other specified premises. For those services which can be performed only on the principal's premises, the computer consultant has the right to use the facilities of the principal but is not required to use the equipment nor comply with policies or regulations of the principal (See subdivision (i)(3));

(4)

The computer consultant does not have use of office facilities and staff support services to the same or similar extent as recognized employees (See subdivision (i)(3));

(5)

The computer consultant does not have a continuing relationship with the principal. The relationship is of short duration or for a single transaction (See subdivision (i)(4));

(6)

The principal does not provide fringe benefits to the computer consultant which are similar to those furnished to recognized employees. Fringe benefits include items such as paid vacations, health insurance and pension plans (See subdivision (i)(6));

(7)

The computer consultant is providing services which are not within the regular business purpose of the principal (See subdivision (i)(7));

(8)

The parties believe they are creating an independent contractor relationship (See subdivision (i)(8));

(9)

The principal does not have the right to instruct the computer consultant in the performance of his or her services other than to specify a desired result contemplated in the agreement to perform services (See subdivision (i)(8)).

(i)

Basic Guidelines: (1) Control. Services of computer consultants are often performed on the premises of the principal. If the principal has the right to require compliance with policies or regulations for the conduct of workers which relate to the manner and means of performing the services, it is evidence that the computer consultant is an employee. Examples of control over conduct of workers may include the following requirements: to be present at specific hours, to work a schedule established by the principal, to adhere to office procedures, and to perform specific activities other than producing a desired result contemplated in the agreement to perform services. Computer consultants may maintain working hours similar to employees because of the need for direct client contact. If the need for client contact is the sole reason for maintaining normal working hours, that factor will not be considered as an indication of employment. If the computer consultant has agreed only to accomplish a desired result, an agreement to comply with standards or policies for the handling of the result upon completion (such as distribution, storage, transportation, or display) or conditions that provide for future maintenance of the work result, is not evidence of employment. If the principal has the right to discharge the computer consultant at will, without cause, and without incurring continuing liability for breach of contract, it is strong evidence that the computer consultant is an employee. Where the computer consultant would feel a sufficient threat from the possibility of discharge, layoff or refusal to re-engage and its consequences to cause him or her to yield to the pressure of the principal's methods in regard to performing the details of the work, an employment relationship is indicated. (2) Separate business. Factors indicating a separately established occupation or business are: (A) Operation of a computer consultant business through a bona fide sole proprietorship, partnership, unincorporated association or corporation. (B) Each of the following factors is an indication that a

computer consultant has a separately established business. When the factors are considered, a determination of whether an individual has a separately established business will depend upon a grouping of factors that are significant in relationship to the services being performed.

1. Marketing specialized individual computer consultant services to a user community directly or through a broker;
2. Maintaining the right to reserve or assign copyright or patent derived from the services performed.
3. Acceptance by the computer consultant of liability for injury or damage from the performance of his or her services;
4. Substantial investment in facilities needed to perform the services (a vehicle used for transportation is not considered a substantial investment);
5. Maintaining an identifiable work location used exclusively for computer-related services;
6. Performance of services for more than one principal at or about the same time;
7. Advertising with business cards, stationary, listing in the industry directory, or other identifiable means;
8. Registration of a fictitious business name, such as "doing business as" (dba);
9. Business licenses if required by the local government;
10. Membership in an independent computer consultant or trade association;
11. Continuing time and financial investment in training, seminars, conferences and technical presentations related to a computer consultant's ongoing business;
12. Substantial investment in a library of professional technical publications, books, manuals and other publications relating to computer consulting.

(3) Premises and Facilities. When the computer consultant performs services on large computer systems belonging to the principal, it is generally impossible for the work to be performed off-site. Thus, in the computer services industry, performing the services on the principal's premises is usually evidence of neither independence nor of an employment relationship. When the principal requires that services be performed on the principal's premises or any other specific site, and those services could, with equal

efficiency and without requiring unreasonable investment, be performed elsewhere, such requirement of services on the principal's premises or specific site is evidence of employment. When the computer services can only be performed on the premises of the principal, using the equipment of the principal, the computer consultant must usually comply with standards and procedures of the principal regarding use of the computer system. Such standards and procedures may include providing a computer account and password for access to the computer system, requiring the use of a designated terminal or terminals, and requiring compliance with procedures built into the system and schedules for use of equipment that can change because of the principal's workload and the availability of the facilities. Such requirements by the principal relating to access or use of the computer system or relating to security requirements of the principal are not evidence of employment or independence. The principal may also provide office procedure and policy manuals, desk or office space, clerical support, mail distribution and receptacle, office supplies, and telephone. When such facilities are provided in the same manner as they are provided for the principal's recognized employees, it is evidence that the computer consultant is performing services as an employee. When the computer consultant performs services along with or alongside recognized employees, the lack of distinctly separate circumstances between the recognized employees and the computer consultant will be evidence that the computer consultant is performing services as an employee. (4) Continuing Relationship. Computer consultant services may involve a single or isolated project, the end result of which may not be achieved for an extended period of time. Whether these services are considered continuous in nature or an isolated event must be determined from all the facts and circumstances and the initially-stated purpose of the service. Agreements to perform computer

consultant services may be documented by purchase order. Purchase orders generally specify that services will be performed during a period of months. A purchase order may specify periods in excess of one year, but most often the period is for three to twelve months. There is often an expectation that the purchase order will be renewed or extended. Purchase orders usually contain four elements: maximum payment, hourly rate, a starting date and an ending date. The computer consultant performing the service generally records and bills the hours to the principal or a broker on an invoice. The hourly rate is generally used because the computer consultant must integrate his or her services into the environment of the principal, adjusting to all of the interruptions and unexpected exigencies of the environment and because of the uncertainty of the method and the precise cost of producing the desired result. When an agreement or purchase order is renewed at its termination, it is evidence of a continuing relationship. It will not be evidence of a continuing relationship if the sole reason for the purchase order's termination and renewal is that it is the end of a fiscal year of the principal or computer consultant, or that it has been discovered that the time allocated in the contract was insufficient. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. However, some computer consultants may have one or more agreements or purchase orders in existence concurrently which provide for the computer consultant to render services from time to time as needed. The duration of such agreements shall not be evidence of employment so long as the computer consultant works for other principals. (5)

Method of payment. Because of the circumstances in the computer industry, described in (4) above, computer consultant remuneration may be computed on an hourly rate regardless of whether the computer consultant is clearly an employee or clearly an independent contractor. Therefore, in the computer

industry, payment computed on an hourly rate is not evidence of employment or independence. In the computer services industry, billing is generally based on an invoice from the computer consultant stating the hours for which services were performed against an agreement or purchase order setting forth an hourly rate and a total amount committed for payment of the services rendered. The agreement or purchase order generally does not set forth the number of hours that the individual is intended to perform services. Where the hourly rate is negotiated between the principal and the consultant, it is not evidence of employment or independence. Where the hourly rate is set by the principal, it is evidence of employment and where the hourly rate is set by the consultant it is evidence of independence. Systematic and regular payment by the week, semi-month, or month is evidence of employment. Payment within a reasonable time of the submission of an invoice by the computer consultant is evidence of independence. When the time for payment on invoices of the computer consultant is substantially the same as for recognized employees of the principal submitting time cards or other work records, it indicates that the invoices are similar to time cards or other work records and is evidence of employment. Advances against payments are evidence of employment, unless such advances are secured by contractual obligation or other generally acceptable loan arrangements. (6) Benefits. An employer typically provides to his or her employees a variety of benefits such as paid vacations, health insurance, and continued education. If the principal supplies benefits such as paid vacations or health insurance, or pays a computer consultant for time spent in general professional education related to the computer consultant's ongoing business, it is evidence of employment. Normally paying for training is evidence of employment. However, additional training specific to a particular contract may be required to complete that contract. Payment by a principal for time spent by a computer

consultant in addition, unique training necessary for the completion of performance under a specific agreement is not evidence of employment or independence, if it is anticipated and stated as part of the initial agreement. (7) Service in principal's regular business. Procedures or systems that satisfy the business needs of the principal are part of the principal's regular business. For example, if the procedures or systems provide an accounting process that is necessary for the operation of a bank or a retailer, those processes are part of the business of the bank or retailer. However, services for a short period to install or create a hardware or software system for a principal are not services in the regular course of the principal's business. In the same way, services for a short period of time to adjust software to the needs of the principal are not in the regular course of the principal's business. On the other hand, services for the operation and use of a system and software used by a principal are generally in the regular course or part of the principal's business. Continued operation, use, maintenance and adjustment of data or software to satisfy continuing needs or variation in the conduct of business are in the regular course of the principal's business. (8) Service Contract. The terminology used in an agreement between a principal and a computer consultant is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee. If the factual relationship between the parties is different from that provided by the agreement and the actions of the parties

indicate control by the principal over the manner and means of performing the service, it is evidence that the agreement does not express the intention of the parties and that an employer-employee relationship does in fact exist. If an agreement between a computer consultant and a principal contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the intent of the agreement will be viewed as an employment contract, even if there is a specific denial of an employment relationship in the agreement. If the purchase order or other form of agreement does not specify the desired result and does specify all or some of the four elements described in subdivision (i)(4) (maximum payment, hourly rate, a starting date and an ending date), it is an agreement to perform services and evidence of employment. (9) Standard walkthrough. A "standard walkthrough" is a conference held from time to time with the principal or his or her staff, or with other computer consultants, wherein the computer consultant's technique and product are discussed or critiqued, and technical errors are identified. Technical errors include failure of the system to perform functions specified or failure of the system to properly integrate with other related systems. Walkthroughs, inspections and performing services as part of a team are recognized in the industry as a standard way to achieve proper integration and correct application of results of computer consultant services. Walkthroughs are normally held by both employees and independent contractors and are not evidence of either employment or independence.

(1)

Control. Services of computer consultants are often performed on the premises of the principal. If the principal has the right to require compliance with policies or regulations for the conduct of workers which relate to the manner and means of performing the

services, it is evidence that the computer consultant is an employee. Examples of control over conduct of workers may include the following requirements: to be present at specific hours, to work a schedule established by the principal, to adhere to office procedures, and to perform specific activities other than producing a desired result contemplated in the agreement to perform services. Computer consultants may maintain working hours similar to employees because of the need for direct client contact. If the need for client contact is the sole reason for maintaining normal working hours, that factor will not be considered as an indication of employment. If the computer consultant has agreed only to accomplish a desired result, an agreement to comply with standards or policies for the handling of the result upon completion (such as distribution, storage, transportation, or display) or conditions that provide for future maintenance of the work result, is not evidence of employment. If the principal has the right to discharge the computer consultant at will, without cause, and without incurring continuing liability for breach of contract, it is strong evidence that the computer consultant is an employee. Where the computer consultant would feel a sufficient threat from the possibility of discharge, layoff or refusal to re-engage and its consequences to cause him or her to yield to the pressure of the principal's methods in regard to performing the details of the work, an employment relationship is indicated.

(2)

Separate business. Factors indicating a separately established occupation or business are: (A) Operation of a computer consultant business through a bona fide sole proprietorship, partnership, unincorporated association or corporation. (B) Each of the following factors is an indication that a computer consultant has a separately established business. When the factors are considered, a determination of whether an individual has a separately established business will depend upon a grouping of factors that are significant in relationship to the services being performed. 1. Marketing

specialized individual computer consultant services to a user community directly or through a broker; 2. Maintaining the right to reserve or assign copyright or patent derived from the services performed. 3. Acceptance by the computer consultant of liability for injury or damage from the performance of his or her services; 4. Substantial investment in facilities needed to perform the services (a vehicle used for transportation is not considered a substantial investment); 5. Maintaining an identifiable work location used exclusively for computer-related services; 6. Performance of services for more than one principal at or about the same time; 7. Advertising with business cards, stationary, listing in the industry directory, or other identifiable means; 8. Registration of a fictitious business name, such as "doing business as" (dba); 9. Business licenses if required by the local government; 10. Membership in an independent computer consultant or trade association; 11. Continuing time and financial investment in training, seminars, conferences and technical presentations related to a computer consultant's ongoing business; 12. Substantial investment in a library of professional technical publications, books, manuals and other publications relating to computer consulting.

(A)

Operation of a computer consultant business through a bona fide sole proprietorship, partnership, unincorporated association or corporation.

(B)

Each of the following factors is an indication that a computer consultant has a separately established business. When the factors are considered, a determination of whether an individual has a separately established business will depend upon a grouping of factors that are significant in relationship to the services being performed. 1. Marketing specialized individual computer consultant services to a user community directly or through a broker; 2. Maintaining the right to reserve or assign copyright or patent derived from the services

performed. 3. Acceptance by the computer consultant of liability for injury or damage from the performance of his or her services; 4. Substantial investment in facilities needed to perform the services (a vehicle used for transportation is not considered a substantial investment); 5. Maintaining an identifiable work location used exclusively for computer-related services; 6. Performance of services for more than one principal at or about the same time; 7. Advertising with business cards, stationary, listing in the industry directory, or other identifiable means; 8. Registration of a fictitious business name, such as "doing business as" (dba); 9. Business licenses if required by the local government; 10. Membership in an independent computer consultant or trade association; 11. Continuing time and financial investment in training, seminars, conferences and technical presentations related to a computer consultant's ongoing business; 12. Substantial investment in a library of professional technical publications, books, manuals and other publications relating to computer consulting.

1.

Marketing specialized individual computer consultant services to a user community directly or through a broker;

2.

Maintaining the right to reserve or assign copyright or patent derived from the services performed.

3.

Acceptance by the computer consultant of liability for injury or damage from the performance of his or her services;

4.

Substantial investment in facilities needed to perform the services (a vehicle used for transportation is not considered a substantial investment);

5.

Maintaining an identifiable work location used exclusively for computer-related services;

6.

Performance of services for more than one principal at or about the same time;

7.

Advertising with business cards, stationary, listing in the industry directory, or other identifiable means;

8.

Registration of a fictitious business name, such as "doing business as" (dba);

9.

Business licenses if required by the local government;

10.

Membership in an independent computer consultant or trade association;

11.

Continuing time and financial investment in training, seminars, conferences and technical presentations related to a computer consultant's ongoing business;

12.

Substantial investment in a library of professional technical publications, books, manuals and other publications relating to computer consulting.

(3)

Premises and Facilities. When the computer consultant performs services on large computer systems belonging to the principal, it is generally impossible for the work to be performed off-site. Thus, in the computer services industry, performing the services on the principal's premises is usually evidence of neither independence nor of an employment relationship. When the principal requires that services be performed on the principal's premises or any other specific site, and those services could, with equal efficiency and without requiring unreasonable investment, be performed elsewhere, such requirement of services on the principal's premises or specific site is evidence of

employment. When the computer services can only be performed on the premises of the principal, using the equipment of the principal, the computer consultant must usually comply with standards and procedures of the principal regarding use of the computer system. Such standards and procedures may include providing a computer account and password for access to the computer system, requiring the use of a designated terminal or terminals, and requiring compliance with procedures built into the system and schedules for use of equipment that can change because of the principal's workload and the availability of the facilities. Such requirements by the principal relating to access or use of the computer system or relating to security requirements of the principal are not evidence of employment or independence. The principal may also provide office procedure and policy manuals, desk or office space, clerical support, mail distribution and receptacle, office supplies, and telephone. When such facilities are provided in the same manner as they are provided for the principal's recognized employees, it is evidence that the computer consultant is performing services as an employee. When the computer consultant performs services along with or alongside recognized employees, the lack of distinctly separate circumstances between the recognized employees and the computer consultant will be evidence that the computer consultant is performing services as an employee.

(4)

Continuing Relationship. Computer consultant services may involve a single or isolated project, the end result of which may not be achieved for an extended period of time. Whether these services are considered continuous in nature or an isolated event must be determined from all the facts and circumstances and the initially-stated purpose of the service. Agreements to perform computer consultant services may be documented by purchase order. Purchase orders generally specify that services will be performed during a period of months. A purchase order may specify periods in excess of one year,

but most often the period is for three to twelve months. There is often an expectation that the purchase order will be renewed or extended. Purchase orders usually contain four elements: maximum payment, hourly rate, a starting date and an ending date. The computer consultant performing the service generally records and bills the hours to the principal or a broker on an invoice. The hourly rate is generally used because the computer consultant must integrate his or her services into the environment of the principal, adjusting to all of the interruptions and unexpected exigencies of the environment and because of the uncertainty of the method and the precise cost of producing the desired result. When an agreement or purchase order is renewed at its termination, it is evidence of a continuing relationship. It will not be evidence of a continuing relationship if the sole reason for the purchase order's termination and renewal is that it is the end of a fiscal year of the principal or computer consultant, or that it has been discovered that the time allocated in the contract was insufficient. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. However, some computer consultants may have one or more agreements or purchase orders in existence concurrently which provide for the computer consultant to render services from time to time as needed. The duration of such agreements shall not be evidence of employment so long as the computer consultant works for other principals.

(5)

Method of payment. Because of the circumstances in the computer industry, described in (4) above, computer consultant remuneration may be computed on an hourly rate regardless of whether the computer consultant is clearly an employee or clearly an independent contractor. Therefore, in the computer industry, payment computed on an hourly rate is not evidence of employment or independence. In the computer services industry, billing is generally based on an invoice from the computer consultant stating

the hours for which services were performed against an agreement or purchase order setting forth an hourly rate and a total amount committed for payment of the services rendered. The agreement or purchase order generally does not set forth the number of hours that the individual is intended to perform services. Where the hourly rate is negotiated between the principal and the consultant, it is not evidence of employment or independence. Where the hourly rate is set by the principal, it is evidence of employment and where the hourly rate is set by the consultant it is evidence of independence. Systematic and regular payment by the week, semi-month, or month is evidence of employment. Payment within a reasonable time of the submission of an invoice by the computer consultant is evidence of independence. When the time for payment on invoices of the computer consultant is substantially the same as for recognized employees of the principal submitting time cards or other work records, it indicates that the invoices are similar to time cards or other work records and is evidence of employment. Advances against payments are evidence of employment, unless such advances are secured by contractual obligation or other generally acceptable loan arrangements.

(6)

Benefits. An employer typically provides to his or her employees a variety of benefits such as paid vacations, health insurance, and continued education. If the principal supplies benefits such as paid vacations or health insurance, or pays a computer consultant for time spent in general professional education related to the computer consultant's ongoing business, it is evidence of employment. Normally paying for training is evidence of employment. However, additional training specific to a particular contract may be required to complete that contract. Payment by a principal for time spent by a computer consultant in additional, unique training necessary for the completion of performance under a specific agreement is not evidence of employment

or independence, if it is anticipated and stated as part of the initial agreement.

(7)

Service in principal's regular business. Procedures or systems that satisfy the business needs of the principal are part of the principal's regular business. For example, if the procedures or systems provide an accounting process that is necessary for the operation of a bank or a retailer, those processes are part of the business of the bank or retailer. However, services for a short period to install or create a hardware or software system for a principal are not services in the regular course of the principal's business. In the same way, services for a short period of time to adjust software to the needs of the principal are not in the regular course of the principal's business. On the other hand, services for the operation and use of a system and software used by a principal are generally in the regular course or part of the principal's business. Continued operation, use, maintenance and adjustment of data or software to satisfy continuing needs or variation in the conduct of business are in the regular course of the principal's business.

(8)

Service Contract. The terminology used in an agreement between a principal and a computer consultant is not conclusive of the relationship, even in the absence of fraud or mistake. On the other hand, such an agreement is evidence of the relationship intended by the parties to the agreement. If the agreement provides for a relationship in which services are to be performed for a principal in such a way that the principal expresses an interest only in the desired result and abandons the right to control the manner and means by which the result is achieved, such an agreement is evidence that the relationship intended was not that of employer and employee. If the factual relationship between the parties is different from that provided by the agreement and the actions of the parties indicate control by the principal over the manner and means of

performing the service, it is evidence that the agreement does not express the intention of the parties and that an employer-employee relationship does in fact exist. If an agreement between a computer consultant and a principal contains provisions which allow for the exercise of control by the principal over the manner and means of performing the service, the intent of the agreement will be viewed as an employment contract, even if there is a specific denial of an employment relationship in the agreement. If the purchase order or other form of agreement does not specify the desired result and does specify all or some of the four elements described in subdivision (i)(4) (maximum payment, hourly rate, a starting date and an ending date), it is an agreement to perform services and evidence of employment.

(9)

Standard walkthrough. A "standard walkthrough" is a conference held from time to time with the principal or his or her staff, or with other computer consultants, wherein the computer consultant's technique and product are discussed or critiqued, and technical errors are identified. Technical errors include failure of the system to perform functions specified or failure of the system to properly integrate with other related systems. Walkthroughs, inspections and performing services as part of a team are recognized in the industry as a standard way to achieve proper integration and correct application of results of computer consultant services. Walkthroughs are normally held by both employees and independent contractors and are not evidence of either employment or independence.