To: Hwy-SF
From: HWY-S

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GOVERNOR

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PRIVATE DIVISION

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING
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KEN KIYABU
DEPUTY COMPTROLLER

February 22, 1989

COMPTROLLER'S MEMORANDUM NO. 1989-7

TO: Heads of Departments and Agencies

FROM: Russel S. Nagata, Comptroller

SUBJECT: Determining Employer-Employee Relationship

DOT-HWY-S
'89 FEB 24 P3:51

This memorandum is to assist departments and other State agencies in determining whether an employer-employee relationship exists with respect to the performance of personal services. Our concern in this matter is the legal requirement, under both U.S. and Hawaii statutes, that employment taxes be withheld and remitted to the appropriate tax jurisdiction if an employer-employee relationship does exist.

Under the various statutes that have potential applicability to the personal services obtained by State agencies, there is no single, simple definition of "employee" that can be used to determine whether an employer-employee relationship exists. Instead, the determination must be made under common law tests on employee status.

The determination cannot be made on the basis of what an individual performing personal services is called. An individual performing personal services may be called an "agent", a "consultant", a "firm", an "independent contractor", or some other such term; however, if common law tests indicate that an employer-employee relationship exists, the individual must be considered an "employee" for the purpose of withholding and remitting applicable employment taxes.

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-O, -H, -M, -K
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Generally, if a State agency is directing and controlling the manner in which an individual works (the particulars of how, when, and where the work is performed) as well as the end-result of the work, then an employer-employee relationship exists. On the other hand, if the State agency does not have the right to direct and control the work in that detail, the individual performing the work would be considered an independent contractor, not an employee.

To assist in making these determinations, we have prepared the attached list of common law tests for agency use and for our pre-audit as personal services contracts and/or expenditures are processed to us. It is important to keep in mind, in use of the list, that no one or two items will necessarily be determinative of whether an employer-employee relationship exists. All factors, including any that may not be represented in the list, must be taken into consideration together, in the context of the nature of the work to be performed.

Effective July 1, 1989, the attached list must be completed and submitted with any personal services contract that is new or that is a renewal or an extension of an existing contract. The attached list must also be completed and submitted with any vouchered payment for personal services not covered by a contract. The answers given on the list will be helpful in our pre-audit process for the evaluation of the employer-employee relationship. If such a relationship is determined to exist, the individual must be paid via the payroll system in order to accomplish required tax withholdings.

In any case in which an agency has already obtained legal advice from its deputy attorney general regarding the question of whether an individual would be performing personal services as an employee or as an independent contractor, the written advice of the deputy attorney general may be submitted in lieu of the attached list. We especially recommend that an agency obtain legal advice in any case recognized to be questionable.

RUSSEL S. NAGATA
Comptroller

Enc.

REVIEW QUESTIONS
FOR EVALUATION OF
PERSONAL SERVICES CONTRACTS

	Yes	No
1. Is the individual required to perform the work on the agency's premises or in other places specified by the agency? [A "no" answer indicates the individual is free to determine the place at which the work is performed.]	_____	_____
2. Does the agency furnish the individual any working materials such as tools, paper, other office supplies, etc.? [A "no" answer indicates the individual furnishes the materials required to perform the work.]	_____	_____
3. Is the individual required to perform the work at times set by the agency? [A "no" answer indicates the individual is free to set the hours of work.]	_____	_____
4. Does the agency provide supervision over the work of the individual by instructing the individual as to how the work is to be performed? [A "no" answer indicates the individual is not controlled with regard to the manner in which the work is performed.]	_____	_____

5. Does the agency compensate the individual for work at a set rate per unit of time (e.g., per hour, or per month)? [A "no" answer indicates the individual is paid on a lump-sum basis for the work or on some other basis independent of time units.] _____ _____

6. Does the agency have the right to discharge the individual for reasons other than failure to complete satisfactorily an identified work assignment within a specified time period? [A "no" answer indicates the individual is not controlled with regard to threat of discharge.] _____ _____

7. Does the individual have the right to quit work without incurring liability or without being legally obligated to complete a work assignment? [A "yes" answer indicates the individual is not controlled with regard to being required to complete an identified work assignment.] _____ _____