



EXECUTIVE COMMITTEE MEETING NOTICE/AGENDA

Posted at www.scdd.ca.gov

DATE: August 13, 2013
TIME: 10 a.m.
LOCATION: DoubleTree by Hilton Sacramento
2001 Point West Way
Sacramento, CA 95815
(916) 924-4900

Pursuant to Government code Sections 11123.1 and 11125(f), individuals with disabilities who require accessible alternative formats of the agenda and related meeting materials and/or auxiliary aids/services to participate in this meeting should contact Michael Brett at (916) 322-8481 or email requests must be received by 5:00 pm August 7, 2013.

AGENDA

Page

- | | | |
|--|-----------|-----------|
| 1. CALL TO ORDER | J. Allen | |
| 2. ESTABLISHMENT OF QUORUM | J. Allen | |
| 3. WELCOME/INTRODUCTIONS | J. Allen | |
| 4. APPROVAL OF JUNE MINUTES | J. Allen | 3 |
| 5. PUBLIC COMMENTS This item is for members of the public only to provide an opportunity to comments and/or present Information to the Council on matters not on the agenda. Each person will be afforded up to three minutes to speak. Written requests, if any, will be considered first. The Council will provide a public comment period, not to exceed a total of seven minutes, for public comment prior to action on each agenda item. | | |
| 6. REVISIT CONFLICT OF INTEREST WAIVERS | M. Corral | 6 |
| 7. FACILITATION SERVICES | R. Newton | 26 |

8. **ESTABLISH SEPTEMBER COUNCIL AGENDA** All
9. **RECESS**
10. **UPON ADJOURNMENT OF JOINT EXECUTIVE/AD-HOC SEARCH COMMITTEE RECONVENE**
11. **CLOSED SESSION – EXECUTIVE DIRECTOR RECRUITMENT** J. Aguilar
Pursuant to Government Code Section 11126 (a)(1) the committee will have a closed session to consider the appointment, employment, evaluation of performance of a public employee.
12. **RECONVENE OPEN SESSION**

Announcement of any action taken during closed session.
13. **ADJOURNMENT** J. Allen

Draft
Executive Committee Meeting Minutes
June 11, 2013

Attending Members

Janelle Lewis
Jennifer Allen
Jorge Aguilar
Molly Kennedy
Kecia Weller

Members Absent

Olivia Raynor
Ray Ceragioli

Others Attending

Mark Polit
Melissa Corral
Roberta Newton
Michael Rosenberg
David Gaines
Ashante Norton
Kara Read-Spangler
CHP Officer

1. **Call to Order**

Jennifer Allen called the meeting to order at 1:40 p.m. and established a quorum present.

2. **Welcome and Introductions**

Members and others introduced themselves.

3. **Approval of April 2013 and May 2013 Minutes**

It was moved/seconded (Aguilar/Lewis) and carried to approve the April 9, 2013, Executive Committee meeting minutes as presented. (1 abstention)
It was moved/seconded (Kennedy/Lewis) to approve the May 14, 2013 minutes as presented. (2 abstentions)

4. **Public Comments**

David Gaines introduced himself as founder of the Sacramento Autistic Spectrum and Special Needs Alliance (SASSNA). Mr. Gaines believes that Area Board 3 handled its Cycle 35 grant process in an illegal manner. He reported that he has filed a 150 page complaint with the SCDD asserting that Area Board 3 is a corrupt organization that has engaged in activities that are at least misdemeanors, if not a felony. He described Michael Rosenberg as a criminal and stated that Roberta Newton should be fired and Melissa Corral be disbarred for their roles in working with

Area Board 3. Mr. Gaines said that he has alerted the federal AIDD and will be filing his complaint also with the Attorney General and the Sacramento City District Attorney.

5. **CPS CONTRACT**

Roberta explained that staff proposes to enter into a small contract under \$5,000 with CPS for a workload analysis of an employee. CPS is a full service HR company that we have used for a variety of personnel consultation services in the past. It was moved/seconded (Kennedy/Aguilar) to approve the contract with CPS.

Jorge then reviewed the current status of our CPS contract to carry out the Executive Director Search. The recruitment brochure was reviewed and discussion ensued about proposed revisions. Jorge will be working with CPS and Council staff on finalizing the brochure within the next two days. Frustration was expressed about the slow pace thus far.

6. **AREA BOARD 3 CYCLE 35 GRANTS**

Michael Rosenberg, Executive Director of Area Board 3 explained that his Board did not approve any applicants for Cycle 35 grants. The Cycle 36 process is starting up in June for the FY October 1, 2013 – September 30, 2014. This year, because of the anticipated reduction in federal funds, the area boards are being allocated \$10,000 as opposed to the \$20,000 awarded in Cycle 35. Mr. Rosenberg requested that the Council allocate Area Board 3 \$20,000 since they had not expended any grant funds in the current cycle.

Mr. Gaines asked to give public input and urged the Committee to not approve Mr. Rosenberg's request.

The Committee took no action on this request.

7. **CLOSED SESSION – PENDING LITIGATION**

The Committee went into closed session

8. **RECONVENE OPEN SESSION**

The Committee reported out the following action with regards to a confidential personnel action: It was moved and seconded (Aguilar/Kennedy) that the Council's counteroffer is the best and final response to the employee's offer. The counteroffer expires on Friday, June 14, 2013 at noon.

9. **HEALTH CARE FOR ADULTS WITH DEVELOPMENTAL DISABILITIES**
Molly discussed the work of the Office of Developmental Primary Care at UCSF in establishing a model for delivering clinical services, advocacy, research and training to medical professionals and others on the health care needs of adults with developmental disabilities. Molly asked that a brief presentation by the Director of the program, Dr. Clarissa Kripke, be included in the July Council meeting. The Committee concurred.
10. **ADMINISTRATIVE COMMITTEE UPDATE**
The Committee has not met since the May Council meeting.
11. **LEGISLATIVE AND PUBLIC POLICY UPDATE**
Mark gave a brief update on trailer bill, specifically the failure to get the autism insurance copay resolved satisfactorily and other budget issues. Mr. Gaines asked to give public input and noted that his organization was the only autism advocacy group that opposed SB 946.
12. **EMPLOYMENT FIRST COMMITTEE**
No report.
13. **PROGRAM DEVELOPMENT COMMITTEE**
Janelle reported that the Committee met on June 3, 2013. They reviewed the applicants for the Self-Advocacy Support grant and made a recommendation that will be brought to the July Council meeting. There were no applicants for the Facilitation grant. The PDC recommends that the Facilitation RFP be released again to a targeted group of SLS and ILS agencies and the maximum amount be increased to \$30,000 from \$20,000. It was moved/seconded (Aguilar/Weller) to approve this recommendation.
14. **ESTABLISH JULY COUNCIL AGENDA**
In addition to the presentation on the work of UCSF, Jorge is working on a team building event. The Search process will be a recurring agenda item and all committee reports.
15. **ADJOURNMENT**
Chair Jennifer Allen adjourned the meeting at 4:20 pm.

DEPARTMENT OF DEVELOPMENTAL SERVICES

1600 9th Street, Room 320, MS 3-9
Sacramento, CA 95814
TDD 654-2054 (For the Hearing Impaired)
(916) 654-1954



June 24, 2013

Duane Law, Executive Director
Kern Regional Center
3200 North Sillect Avenue
Bakersfield, CA 93308

Dear Mr. Law:

Thank you for your correspondence dated February 7, 2013. The Department of Developmental Services (Department) is in receipt of the Conflict of Interest Reporting Statement and proposed Conflict Resolution Plan for Iman Killebrew, a Kern Regional Center (KRC) Board member and the Chairperson of the Vendor Advisory Committee. The noted conflict is that Ms. Killebrew is the co-owner of Aimes and As One, Inc., vendored by KRC to provide supported living services, residential services, and mobile, community-based program services. Ms. Killebrew's husband, Steve Killebrew, is involved in both companies. The Department received correspondence dated May 20, 2013, from the State Council on Developmental Disabilities (SCDD) denying KRC's Conflict Resolution Plan.

Title 17, California Code of Regulations (Cal. Code Regs., tit. 17), section 54534(a), prevents the Department from approving a Conflict Resolution Plan of a regional center governing board member without the approval of both the area board in the respective area and SCDD. Pursuant to Cal. Code Regs., tit. 17, section 54534(h), the governing board member shall have thirty (30) calendar days from the date of receipt of the Department's written denial in which to either eliminate the conflict of interest or resign his or her position as a governing board member. The board member shall avoid all involvement with and participation in the conflict of interest in question during this thirty (30) calendar-day period. Please notify the Department in writing of the action taken to resolve this conflict.

If you have any questions regarding this correspondence, please contact Kathy Brian, Regional Center Operations Section, at (916) 654-2198.

Sincerely,

A handwritten signature in cursive script that reads "Brian Winfield".

BRIAN WINFIELD
Acting Deputy Director
Community Operations Division

cc: See next page

Duane Law
June 24, 2013
Page two

cc: Susan Lara, KRC Board of Directors
Joseph Bowling, Area Board VII
Vicki Smith, Area Board XII
Jorge Aguilar, SCDD

DEPARTMENT OF DEVELOPMENTAL SERVICES

1600 9th Street, Room 320, MS 3-9
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June 24, 2013

Duane Law, Executive Director
Kern Regional Center
3200 North Sillect Avenue
Bakersfield, CA 93308

Dear Mr. Law:

Thank you for your correspondence dated February 7, 2013. The Department of Developmental Services (Department) is in receipt of the Conflict of Interest Reporting Statement and proposed Conflict Resolution Plan for Ramona Puget, a Kern Regional Center (KRC) Board member. The noted conflict is that Ms. Puget is the President of Kern Autism Network, a KRC vendor that funds an annual conference on autism. Ms. Puget serves as a volunteer and receives no financial compensation. The Department received correspondence dated May 20, 2013, from the State Council on Developmental Disabilities (SCDD) denying KRC's Conflict Resolution Plan.

Title 17, California Code of Regulations (Cal. Code Regs., tit. 17), section 54534(a), prevents the Department from approving a Conflict Resolution Plan of a regional center governing board member without the approval of both the area board in the respective area and SCDD. Pursuant to Cal. Code Regs., tit. 17, section 54534(h), the governing board member shall have thirty (30) calendar days from the date of receipt of the Department's written denial in which to either eliminate the conflict of interest or resign his or her position as a governing board member. The board member shall avoid all involvement with and participation in the conflict of interest in question during this thirty (30) calendar-day period. Please inform the Department in writing of the action taken to resolve this conflict.

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Sincerely,

A handwritten signature in cursive script that reads "Brian Winfield".

BRIAN WINFIELD
Acting Deputy Director
Community Operations Division

cc: See next page

Duane Law
June 24, 2013
Page two

cc : Susan Lara, KRC Board of Directors
Joseph Bowling, Area Board VIII
Vicki Smith, Area Board XII
Jorge Aguilar, SCDD

DEPARTMENT OF DEVELOPMENTAL SERVICES

1600 NINTH STREET, Room 320, MS 3-9
SACRAMENTO, CA 95814
TDD 654-2054 (For the Hearing Impaired)
(916) 654-1954



June 24, 2013

Duane Law, Executive Director
Kern Regional Center
3200 North Sillect Avenue
Bakersfield, CA 93308

Dear Mr. Law:

Thank you for your correspondence dated February 7, 2013. The Department of Developmental Services (Department) is in receipt of the Conflict of Interest Reporting Statement and proposed Conflict Resolution Plan for Richard Stotler, the current Vice-President of Kern Regional Center's (KRC) governing board. The noted conflict is that Mr. Stotler's mother is the owner of a building that is rented to Great Advantages SLS, a KRC vendor. The Department received correspondence dated May 20, 2013, from the State Council on Developmental Disabilities (SCDD), denying KRC's Conflict Resolution Plan.

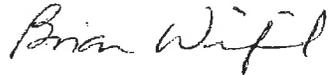
Title 17, California Code of Regulations (Cal. Code Regs., tit. 17), section 54534(a), prevents the Department from approving a Conflict Resolution Plan of a regional center governing board member without the approval of both the area board in the respective area and SCDD. Pursuant to Cal. Code Regs., tit. 17, section 54534(h), the governing board member shall have thirty (30) calendar days from the date of receipt of the Department's written denial in which to either eliminate the conflict of interest or resign his or her position as a governing board member. The board member shall avoid all involvement with and participation in the conflict of interest in question during this thirty (30) calendar-day period. Please inform the Department in writing of the action taken to resolve this conflict.

"Building Partnerships, Supporting Choices"

Duane Law
June 24, 2013
Page two

If you have any questions regarding this correspondence, please contact Kathy Brian,
Regional Center Operations Section, at (916) 654-2198.

Sincerely,



BRIAN WINFIELD
Acting Deputy Director
Community Operations Division

cc: Susan Lara, KRC Board of Directors
Joseph Bowling, Area Board VIII
Vicki Smith, Area Board XII
Jorge Aguilar, SCDD

DEPARTMENT OF DEVELOPMENTAL SERVICES

1600 NINTH STREET, Room 320, Mail Stop 3-9
SACRAMENTO, CA 95814
TDD 654-2054 (For the Hearing Impaired)
(916) 654-1954



June 28, 2013

Carol Fitzgibbons, Executive Director
Inland Regional Center
P.O. Box 19037
San Bernardino, CA 92423

Dear Ms. Fitzgibbons:

Thank you for your correspondence dated January 15, 2013. The Department of Developmental Services (Department) is in receipt of the Conflict or Interest Reporting Statement and proposed Conflict Resolution Plan for Jack Padilla, an Inland Regional Center (IRC) Board member. The noted conflict is that Mr. Padilla's daughter is an On-Call Registered Nurse for an IRC provider that delivers skilled and intermediate care to people in a large, 55-bed facility. The Department received correspondence dated March 5, 2013, from Area Board XII approving the Conflict Resolution Plan; however, on May 20, 2013, the Department received correspondence from the State Council on Developmental Disabilities (SCDD) denying IRC's Conflict Resolution Plan.

Title 17, California Code of Regulations (Cal. Code Regs., tit. 17), section 54534(a), prevents the Department from approving a Conflict Resolution Plan of a regional center governing board member without the approval of both the area board in the respective area and the SCDD. Pursuant to Cal. Code Regs., tit. 17, section 54534(h), the governing board member shall have thirty (30) calendar days from the date of receipt of the Department's written denial in which to either eliminate the conflict of interest or resign his or her position as a governing board member. The board member shall avoid all involvement with and participation in the conflict of interest in question during this thirty (30) calendar-day period.

If you have any questions regarding this correspondence, please contact Allan Smith, Regional Center Operations Section, at (916) 654-3668.

Sincerely,

A handwritten signature in cursive script that reads "Brian Winfield".

BRIAN WINFIELD
Acting Deputy Director
Community Operations Division

cc: see next page

"Building Partnerships, Supporting Choices"

Carol Fitzgibbons, Executive Director
June 28, 2013
Page two

cc: Drew Cutler, IRC Board of Directors
Jorge Aguilar, CSCDD
Vicki Smith, Area Board XII



INLAND REGIONAL CENTER

...valuing independence, inclusion and empowerment

P. O. Box 19037, San Bernardino, CA 92423

Telephone: (909) 890-3000

Fax: (909) 890-3001

June 26, 2013

Jorge Aguilar, Chairperson
State Council on Developmental Disabilities
1507 21st Street, Suite 210
Sacramento, CA 95811

Dear Mr. Aguilar,

On behalf of the Board of Trustees for Inland Counties Regional Center Inc., please accept this letter as a request to **reconsider** the Conflict of Interest waiver for Mr. Jack Padilla. Again, I discussed this matter with Mr. Padilla and he reconfirmed he is committed to the consumers and their families, the employees and the community providers.

Mr. Padilla's daughter is a registered nurse, lives in an area that does not have much to offer in the way the employment opportunities, has a family and needs to make a living to assist with supporting her own family. Working with a Nursing Registry has been the best option for her and she will periodically work at a skilled and intermediate care facility that has capacity for 55 people during the night shift. At any one time there are only about 5 or 6 people residing at this facility who are developmentally disabled. She is not placed in the area to work with them. **Job responsibilities do not include supervision, finances, decision-making or policy setting.** Due to the time of her schedule, she is asked to review record documentation and other recordkeeping is completed by the employees; She does not include records of persons with developmental disabilities.

It is important to point out that Mr. Padilla is a former long-term employee of IRC. He is dedicated to the mission of regional centers and the commitment made by the state of California to support people with developmental disabilities so that they are able to learn, grow and experience independence. IRC Board of Trustees benefits greatly from his experience and spirit that he offers to decision making. **He will abstain from voting on matters that are financial and/or policy that may have an impact on providers of services.**

A packet of information was provided previously and offered sufficient information to know that Mr. Padilla is committed to fulfilling his responsibility as an active, honest and dedicated member of the board.

Mr. Aguilar, Chairperson
June 26, 2013
Page 2

I am hopeful that this additional clarity of Mr. Padilla's daughter's responsibilities will allow the State Council on Developmental Disabilities to support IRC's Board of Trustees' request to approve the Conflict of Interest waiver for Mr. Padilla. He will be a valuable asset on the Board of Trustees as IRC moves forward to achieve sustainability as requested by the Department of Developmental Services and will remove the probation status. Once approved, Mr. Padilla will be able to remain as an active member serving an important role for persons with developmental disabilities in the Inland Empire.

I remain available to provide any additional information that you may require in your review of this waiver. Thank you for your assistance in this matter. We are very willing to work cooperatively in this process. If you have any additional questions, please feel free to contact me at 909-890-3400.

Sincerely,



Carol A. Fitzgibbons
Executive Director

Copy: Marybeth Feild, President
Terri Delgadillo, DDS
Brian Winfield, DDS
Allan Smith, DDS
Vicki Smith, Area Board 12

INLANDCOUNTIES REGIONAL CENTER, INC.

CONFLICT OF INTEREST RESOLUTION PLAN:

Conflict of Interest is described in the attached statement

1. Nature of Conflict of Interest:

- a. Mr. Padilla disclosed his potential conflict of interest as outlined on both IRC and DDS's forms used for annual Conflict of Interest Reporting Statement (see attached).

2. Type of Interest:

- a. See attached

3. Actions to be taken, including necessary timeframes, to eliminate, mitigate, and manage the conflict:

Mr. Padilla's daughter is a registered nurse and is listed on a registry that supports several of the IRC vendors.

ICRC, Board of Trustees is fully aware of this potential conflict and Mr. Padilla has agreed to abstain from voting on any decisions affecting the financial position of an IRC provider. This will include those matters related to rates of reimbursement paid to providers, changes in vendorization due to the state of business of the registry and/or providers up to and including de-vendorization, during the period of time that his daughter is listed on the Registered Nurses' registry and the potential for her to gain benefit based on his vote.

Further, Mr. Padilla has agreed not to discuss with his daughter these matters during any preliminary period of discussion prior to final decision/s. This would include those matters that could influence the financial support paid by the type of vendor where Mr. Padilla's daughter may have the opportunity to work in an on-call capacity.

4. Monitoring Mechanism:

Director, Financial Services shall not include Mr. Padilla in final decisions regarding rates of reimbursement or business/vendorization status regarding vendors where his daughter may have an opportunity to work. Chair of the Business Committee of the Board of Trustees will review any decisions regarding the vendorization and rates to assure that Mr. Padilla has not been involved in the decisions.

The minutes of the board action/s will record Mr. Padilla's abstention from voting as necessary.



President, Board of Trustees

Board of Trustees advised and accepted the Conflict of Interest statement.



President

1/14/13

Date



Secretary

Date

JANUARY 9, 2013

1.2.4 Agency Policies (Continued)

1.2.4(v) Policy on Conflict of Interest for Board of Trustees

INLAND REGIONAL CENTER

BOARD OF TRUSTEES CONFLICT OF INTEREST DECLARATION

I, Jack J. Padilla am a member of the Board of Trustees of the INLAND REGIONAL CENTER. I hereby declare that:

- I. I have read and I understand the Conflict of Interest Standards Statement attached hereto.
- II. I have reviewed my current situation in view of the Conflict of Interest for Members of the Board of Trustees and have determined the following: (Place a check mark next to the applicable lettered subparagraph below.)
 - A. I have no present or potential, direct or indirect financial interest or activity which may place me in a position which may be described as inimical to, conflicting with or inconsistent with my duties, functions and responsibilities at the Inland Regional Center.
 - B. I have a conflict of interest, which currently exists.
 - C. I have a potential conflict of interest based upon circumstances reasonably expected to occur in the future which may result in a conflict of interest.

III. If either subparagraph B or subparagraph C in Paragraph II, above, has been checked, describe completely the nature of the conflict of interest or potential conflict of interest: (Please attach additional pages as needed.)

my adult daughter is a Registered Nurse. This might be a conflict according to you.

IV. I understand that if either subparagraph B or subparagraph C of Paragraph II above has been checked, I may request a waiver of the conflict of interest or potential conflict of interest described above. I also understand that if either said subparagraph B or said subparagraph C has been checked, or I do not request a waiver or my request for waiver is denied, my capacity as a member of the Board of Trustees cannot continue unless I eliminate the conflict of interest or potential conflict of interest.

- A. I do /do not request a waiver of the conflict of interest or potential conflict of interest described above.
- B. (To be answered if a waiver is requested) I suggest the following plan of action the resolution of the present or potential conflict of interest described above, which plan of action includes limitations on me which will enable me to avoid actions involving the conflict

September 1, 2005/reviewed no changes July 1, 2010/reviewed March 14, 2011/reviewed and updated September 12, 2011

1.2.4 Agency Policies (Continued)

1.2.4(v) Policy on Conflict of Interest for Board of Trustees

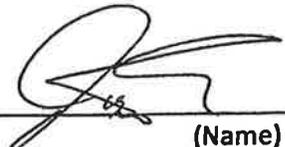
of interest during the period of time in which my waiver request is being reviewed pursuant to Section 54523 of Title 17 of the California Code of Regulations: (Please attach additional pages as needed.)

Mr. Padilla understand - he will abstain from voting on any financial or business matter that may have an impact on his daughter's financial situation if working for

V. I shall bring any future conflict of interest or potential conflict of interest which may arise during my relationship with the INLAND REGIONAL CENTER to the immediate attention of the Board of Trustees and to the attention of the person designated by the Board of Trustees to review such conflicts. I understand that the Department of Developmental Services, the Area Board and the State Council must approve any request for waiver of a conflict of interest or potential conflict of interest by a member of the Board of Trustees. I further understand that I may be fined up to \$50,000 if I knowingly misstate a conflict of interest or potential conflict of interest.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing is true and correct.

Executed at Inland Regional Center, California, this 9 day of July, 2012.



(Name)

September 1, 2005/reviewed no changes July 1, 2010/reviewed March 14, 2011/reviewed and updated September 12, 2011

**CONFLICT OF INTEREST REPORTING STATEMENT
DS 6016 (New 08/2012)**

The duties and responsibilities of your position with the regional center require you to file this Conflict of Interest Reporting Statement. The purpose of this statement is to assist you, the regional center and the Department of Developmental Services (DDS) to identify any relationships, positions or circumstances involving you which may create a conflict of interest between your regional center duties and obligations, and any other financial interests and/or relationships that you may have. In order to be comprehensive, this reporting statement requires you to provide information with respect to your financial interests.

A "conflict of interest" generally exists if you have one or more personal, business, or financial interests, or relationships that would cause a reasonable person with knowledge of the relevant facts to question your impartiality with respect to your regional center duties. The specific circumstances and relationships which create a conflict of interest are set forth in the California Code of Regulations, title 17, sections 54500 through 54530. You should review these provisions to understand the specific financial interests and relationships that can create a conflict of interest.

Please answer the following questions to the best of your knowledge. If you find a question requires further explanation and/or there is not enough space to thoroughly answer the question, please attach as many additional sheets as necessary, and refer to the question number next to your answer. If the regional center identifies a conflict involving you, it will be required to prepare a conflict resolution plan. Some relevant definitions have been provided in the footnotes to assist you in responding to this statement.

You are required to file this Reporting Statement within 30 days of beginning your employment with the regional center or from the date that you are appointed to the regional center board or advisory committee board. You are then required to file an annual Reporting Statement by August 1st of every year while you remain employed with the regional center or while you are a member of the regional center board or advisory committee board. You must also file a Reporting Statement within 30 days of any change in your status that could result in a conflict of interest. Circumstances that can constitute a change in your status that can require you to file an updated Reporting Statement are described below in footnote one.

A. INFORMATION OF REPORTING INDIVIDUAL

Name: Jack J. Padilla Regional Center: Inland Regional

Regional Center Position/Title: Governing Board Member Executive Director
 Vendor Advisory Committee sitting on Board Employee
 Contractor Agent Consultant

Reporting Status: Annual New Appointment (date): _____
 Change of Status¹

If a change in status, date and circumstance of change in status:
September, 2012 - daughter is an on-call nurse for a local vendor of IRC.

1. Please list your job title and describe your job duties at the regional center.

Board Member - Finance
Retired

¹ Change of status includes reporting a previously unreported activity that should have been reported, change in the circumstance of a previously reported activity, change in financial interest, familial relationship, legal commitment, change in regional center position or duties, or change to outside position or duties. See California Code of Regulations, title 17, sections 54531(d) and 54532(d).

n/a

| |
|---|
| <input type="checkbox"/> Governing Board Member |
| <input type="checkbox"/> Vendor Advisory on Board |
| <input type="checkbox"/> Executive Director |
| <input type="checkbox"/> Employee/Other |

2. Do you or a family member² work for any entity or organization that is a regional center provider or contractor?
 yes no -- If yes, provide the name of the entity or organization and describe what services it provides for the regional center or regional center consumers. If the provider or contractor is a state or local entity, provide the specific name of the state or local entity and describe your job duties at the state or local entity.

*Braswell Hampton Manor —
 Adult Daughter*

3. Do you or a family member own or hold a position³ in an entity or organization that is a regional center provider or contractor? yes no -- If yes, provide the name of the entity or organization, describe what services it provides for the regional center or regional center consumers, and describe your or your family member's financial interest.

On - Call R.N.

4. Are you a regional center advisory committee board member? yes no -- If yes, are you a member of the governing board or owner or employee of an entity or organization that provides services to the regional center or regional center consumers? yes no -- If yes, provide the name of the entity or organization and describe what services it provides for the regional center or regional center consumers.

5. If you are a regional center advisory committee board member and answered yes to all the questions in Question 4 above, do any of the following apply to you: (a) are you an officer of the regional center board; (b) do you vote on purchasing services from a regional center provider; or (c) do you vote on matters where you might have a financial interest? yes no -- If yes, please explain.

² Family member includes your spouse, domestic partner, parents, stepparents, grandparents, siblings, stepsiblings, children, stepchildren, grandchildren, and in-laws. See California Code of Regulations, title 17, sections 54505(f).

³ For purposes of this question, hold a position generally means that you or a family member is a director, officer, owner, partner, employee, or shareholder of an entity or organization that is a regional center provider or contractor. For a specific description of positions that create a conflict of interest in a regional center provider or contractor see the California Code of Regulations, title 17, sections 54520 and 54526.

| |
|---|
| <input type="checkbox"/> Governing Board Member |
| <input type="checkbox"/> Vendor Advisory on Board |
| <input type="checkbox"/> Executive Director |
| <input type="checkbox"/> Employee/Other |

6. Do any of the decisions you make when performing your job duties with the regional center have the potential to financially benefit you or a family member⁴? yes no -- If yes, please explain.

7. Are you responsible for negotiating, making,⁵ executing or approving contracts on behalf of the regional center? yes no -- If yes, please explain.

8. Do you have a financial interest in any contract⁶ with the regional center? yes no -- If yes, did you negotiate, make, execute or approve the contract on behalf of the regional center? yes no -- If yes, please explain.

9. Do any of your family members have a financial interest in any contract with the regional center? yes no
 If yes, did you negotiate, make, execute or approve the contract on behalf of the regional center? yes no
 If yes, please explain.

⁴ Generally, a decision can financially benefit you or a family member if the decision can either directly or indirectly cause you or a family member to receive a financial gain or avoid a financial loss. For a specific description of the types of decisions that can result in a financial benefit to you or a family member see the California Code of Regulations, title 17, sections 54522 and 54527.

⁵ California Code of Regulations, title 17, sections 54523(b)(2) and 54528(b)(2) describes the types of conduct which constitute involvement in the making of a contract.

⁶ For purposes of questions 8 and 9, a financial interest in a contract generally means any direct or indirect interest in a contract that can cause you or a family member to receive any sort of financial gain or avoid any sort of financial loss irrespective of the dollar amount. California Code of Regulations, title 17, sections 54523 and 54528 define when financial interests in a contract will occur.

- Governing Board Member
- Vendor Advisory on Board
- Executive Director
- Employee/Other

10. Do you evaluate employment applications or contract bids that are submitted by your family member(s)?
 yes no -- If yes, please explain.

11. Your job duties require you to act in the best interests of the regional center and regional center consumers. Do you have any circumstances or other financial interests not already discussed above that would prevent you from acting in the best interests of the regional center or its consumers? yes no -- If yes, please explain.

B. ATTESTATION

I JACK Padilla (print name) HEREBY CONFIRM that I have read and understand the regional center's Conflict of Interest Policy and that my responses to the questions in this Conflict of Interest Reporting Statement are complete, true, and correct to the best of my information and belief. I agree that if I become aware of any information that might indicate that this statement is not accurate or that I have not complied with the regional center's Conflict of Interest Policy or the applicable conflict of interest laws, I will notify the regional center's designated individual immediately. I understand that knowingly providing false information on this Conflict of Interest Reporting Statement shall subject me to a civil penalty in an amount up to fifty thousand dollars (\$50,000) pursuant to Welfare and Institutions Code section 4626.

Signature  Date 10-9-2012

| | |
|--|------------------------------------|
| INTERNAL USE ONLY | |
| Date this Statement was received by Reviewer: _____ | |
| The reporting individual <input type="checkbox"/> does <input type="checkbox"/> does not have a <input type="checkbox"/> present <input type="checkbox"/> potential conflict of interest | |
| Signature of Designated Reviewer <u></u> | Date Review Completed _____ |

KERN REGIONAL CENTER

Supporting Equality, Independence & Opportunity



July 30, 2013

Jorge Aguilar
Chairperson
State Council of Developmental Disabilities
1507 21st Street suite 210
Sacramento, CA 95811

Mr. Aguilar:

Recently Kern Regional Center received a letter from your office apprising us of the decision to deny the waiver request for the conflict of interest plan for Ramona Puget, our Board Secretary. We were stunned and concerned as to the rationale for this decision based on the waiver submitted. Ms. Puget is a valued member of our Board of Directors and a strong advocate for individuals in the community. We value her expertise to inform the Kern Regional Center Board of Directors on legal, autism-related and other service concerns. Ms. Puget is of Hispanic/Spanish decent and is the mother of two KRC clients. All of these factors are requirements for composition of our Board of Directors.

Ms. Puget does not gain financially from her role on the Board of Directors. The conflict of interest referenced in the Department of Developmental Services follow up letter states: "The noted conflict is that Ms. Puget is the President of Kern Autism Network, a KRC vendor that funds an annual conference on autism. Ms. Puget serves as a volunteer and receives no financial compensation." Based on this acknowledgement there does not appear to have an active conflict of interest relative to Ms. Puget's potential gain.

The routine nature of the declaration process and the disclosures provided indicate a diligence to compliance and monitoring by Kern Regional Center Board of Directors. The members of the Board have worked diligently over the past 16 months to enhance the Board's composition and capability. Ms. Puget is a critical component of the Board Executive Committee and her integrity is beyond reproach in her engagement with Board discussions and guidance to the Regional Center.

I appreciate the challenge of the review and determination process regarding conflict of interest and value the oversight to our governing bodies throughout the state. It is imperative that the system works to avoid overcompensating for the errors of the past by reacting to individuals who are forthright and supportive of our mission while they hold us all accountable for our fiduciary obligations. Ms. Puget is one of these individuals and her value to our Board of Directors is not conflicted by her service to the community through Kern Autism Network.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Law", written over a horizontal line.

Duane A. Law, MA
Chief Executive Officer

3200 No. Sillect Avenue • Bakersfield, California 93308
(661) 327-8531 • Fax (661) 324-5060 • TDD (661) 327-1251

Maitino, Robin@SCDD

To: Newton, Roberta@SCDD
Subject: Autism Society Concern

It is very important that the voice of those impacted by autism be part of your state and local governmental regional center advisory boards as well as developmental disability councils. It was therefore a great surprise to us at the Autism Society of America that Ms. Ramona Puget, a long time and very strong advocate for all people with disabilities, is being asked to resign based on your request and your conclusion that she has a conflict of interest, which we assume relates to her involvement with her local Autism Society.

I know that throughout the nation, as well as at the federal and state level, Autism Society volunteers are members of government councils such as your council. To help us advise Ms. Puget on this matter, we are encouraging her not to resign but rather seek the specific and legally authorized policy that determines that she has a conflict of interest. Both Ramona and I like to know what that conflict is and if your determination of such a conflict is duly authorized and approved by executive as well as legislative proper and legal decision making?

We can not allow an autism advocate to be asked to leave a government board without first having you provide Ms. Puget and us the written rule and justification defining how she has a conflict based on her conflict of interest statement. As the nation's best advocate for all impacted by autism, we also ethically and morally can't allow any decision to remove a strong and highly productive advocate from a governing body until such time you demonstrate written law or administrative properly developed rules that define the rationale or your request to remove her. Not seeing such rules, I would question if your intent is to remove an advocate representing one out of every 88 people in your state who live with autism from being heard and assisting your state enhance services and support to those you have a legal mandate to serve, I would welcome a quick written response to this email so we can advise Ramona on the actions she should take regarding this matter including seeking a review of your request by both the Governor's office as well as California Attorney General. If you choose not to respond, we will conclude you are in agreement with us that there is no law or other government consistent rule that defines Ms. Puget having a conflict of interest.

Sincerely,

Scott Badesch
President/CEO
Autism Society of America

Sent from my iPad. Please excuse spelling mistakes.

KERN REGIONAL CENTER

Supporting Equality, Independence & Opportunity



July 30, 2013

Jorge Aguilar
Chairperson
State Council of Developmental Disabilities
1507 21st Street suite 210
Sacramento, CA 95811

Mr. Aguilar:

Recently Kern Regional Center received a letter from your office apprising us of the decision to deny the waiver request for the conflict of interest plan for Richard Stotler, our Board Vice-President. We were concerned as to the rationale for this decision based on the waiver submitted. Mr. Stotler is a valued and long-serving member of our Board of Directors and a strong voice for integrity in all areas of our Board's oversight and considerations related to the Regional Center. We value his commitment to the community of individuals served, families and his support of fiscal integrity. Through his leadership he provides an extraordinary stability to our Board of Directors and is a strong voice for our fiduciary responsibilities. As a former School District Superintendent, Mr. Stotler brings a strong knowledge of organizational structures and board related systems that are imperative for our Board of Directors going forward. Mr. Stotler also serves on the ARCA Board as a delegate member from Kern Regional Center.

The conflict of interest referenced in the Department of Developmental Services follow up letter states: "The noted conflict is that Mr. Stotler's mother is the owner of a building that is rented to Great Advantages SLS, a KRC Vendor." Mr. Stotler does not gain financially from his mother's association through rental of one of her properties. Mr. Stotler's waiver stipulates that he will not participate in Board actions that would impact this or like organizations through Supported Living Services. Based on this acknowledgement there does not appear to have an active conflict of interest relative to Mr. Stotler's potential gain. In fact, Mr. Stotler did not even know about the rental tenants in his mother's properties until a member of the organization extended their greetings to him through his mother.

The routine nature of the declaration process and the disclosures provided indicate a diligence to compliance and monitoring by Kern Regional Center Board of Directors. The members of the Board have worked diligently over the past 16 months to enhance the Board's composition and capability. Mr. Stotler is a critical component of the Board Executive Committee and his integrity is beyond reproach in his engagement with Board discussions and guidance to the Regional Center.

I appreciate the challenge of the review and determination process regarding conflict of interest and value the oversight to our governing bodies throughout the state. It is imperative that the system works to avoid overcompensating for the errors of the past by reacting to individuals who are forthright and supportive of our mission while they hold us all accountable for our fiduciary obligations. Mr. Stotler is one of these individuals and his value to our Board of Directors is not conflicted by his mother's ownership of a building utilized, through a rental agreement, by a Supported Living Service. I would implore the Council to reconsider their decision regarding Mr. Stotler's declaration and waiver which seeks to mitigate the conflict.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Law", written over a horizontal line.

Duane A. Law, MA
Chief Executive Officer

3200 No. Sillect Avenue • Bakersfield, California 93308
(661) 327-8531 • Fax (661) 324-5060 • TDD (661) 327-1251

INDEPENDENT CONTRACTOR OR COMMON LAW EMPLOYEE FOR USE BY STATE AGENCIES

The purpose of this article is to advise State agency secretaries and directors and other State hiring authorities of the common law and statutory distinctions between an independent contractor and an employee. This article is intended for use by California State agencies. Effective immediately, this article supersedes Management Memo 95-18.

This article also advises State agency secretaries and directors that employers (including State agencies) are subject to various State and federal statutes governing the collection of payroll taxes for all employees (including contractors determined to be "employees" under common law or statutory employee definitions). These payroll taxes may include social security and medicare taxes, federal income tax withholding, unemployment insurance, State employment training tax, State nonindustrial disability, and State personal income tax withholding. The amount of taxes required by federal and State law to be withheld from State employee earnings and the related employer tax contribution (where applicable) are reported by the State Controller to federal and State tax authorities on the appropriate forms and to the employee on the *Wage and Tax Statement (Form W-2)*.

However, employers, including State agencies, are not required to withhold taxes from independent contractor earnings. Instead, the State is required to file an information return, IRS Form 1099-MISC, for certain payments made to independent contractors. In addition, effective January 1, 2001, California employers must report independent contractors, using the *Report of Independent Contractor(s) (DE 542)*, to the Employment Development Department. For additional information regarding the reporting of independent contractors to California, contact:

Employment Development Department (EDD)
Independent Contractor Hotline
Telephone: (916) 657-0529

The Internal Revenue Code imposes substantial penalties on employers (refer to page 4) for improper classification of employees as independent contractors. Penalties incurred by a State agency will be paid out of the State agency's support appropriation.

CLASSIFICATION OF INDEPENDENT CONTRACTOR/EMPLOYEE FOR FEDERAL TAX PURPOSES

The IRS *Employer's Supplemental Tax Guide* (Publication 15-A) provides the following guidelines, effective January 1, 2000:

- Behavioral Control. Factors related to a business's right to direct and control how the worker performs the task.
- Financial Control. Factors related to a business's right to control the business aspects of the worker's job.
- Relationship of the Parties. Factors showing the type of relationship between the worker and the business.

The application of these factors determines common law employee or independent contractor status for federal tax purposes. Consult Publication 15-A for details and examples to help properly classify the workers. For additional information, access the IRS Web site at www.irs.gov and follow the links to all IRS forms and publications.

The IRS Form SS-8 (*Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*) should be used when, at the discretion of the State agency and after consultation with EDD's Audit Section, it is necessary to seek IRS assistance in determining independent contractor/employee status (refer to Independent Contractor/Employee Determination Assistance on page 3).

CLASSIFICATION OF INDEPENDENT CONTRACTOR/EMPLOYEE FOR STATE TAX PURPOSES

The EDD administers California's employment tax laws. The California Code of Regulations, Section 4304-1, defines an employee and lists the rules generally applicable to common law determinations of employment. The EDD has prepared a list of 24 common law elements to help State agencies distinguish between an independent contractor and an employee (refer to Attachment I).

The information in the "Employee" column of Attachment I represents situations in which the 24 elements indicate that the contractor is subject to the employer's direction and control. Therefore, when a State agency retains the right to direct and control the work performed under a contract, a common-law employer/employee relationship is created even if the State agency (employer) allows the contractor (employee) freedom of action.

To determine if an independent contractor/employee relationship exists for State of California tax purposes, it is not necessary that all 24 elements in Attachment I be considered or weighted equally. Because this determination process can be relatively subjective, program managers may find it useful to compare their working relationship with the contractor to their relationship with civil service employees. In that comparison,

if the following statements are true, it is presumed that the individual to be engaged is an employee and, once such a conclusion is made, it is not necessary to continue to apply the 24 elements:



- * • The worker can quit or be terminated at any time without being legally obligated for failure to complete the job.
- * • The manager (or designated person) assigns, reviews, and supervises the individual's work.
- * • The worker performs services that are a part of the regular operation of the State agency.

State program managers who contract with individuals for personal and other services must review Attachment I to determine if the State agency has effectively retained the right to direct and control the contractor or if, in the performance of contract services, the contractor is independent.

In addition, existing State law confers statutory employee status on an individual under specific circumstances in spite of the fact that the individual is determined to be an independent contractor using common law. The following are the categories of statutory employees:

- Artists, authors, and creators of copyrighted work
- Unlicensed construction workers
- Homeworkers

State agencies that intend to contract with individuals in the groups listed above should consult the *California Employer's Guide* (DE 44) or call EDD's Audit Section at (916) 464-2500 for advice regarding their employment status.

INDEPENDENT CONTRACTOR/EMPLOYEE DETERMINATION ASSISTANCE

The State agency program manager who is required to certify the independent contractor/employee status based upon the criteria provided in this document may find it difficult to reach a definite determination and may need assistance. In such instances, the program manager should call:

Employment Development Department
Audit Section
Telephone: (916) 464-2500

In addition, at EDD's Web site (www.edd.ca.gov), you can access forms and publications such as the DE 44, *Determination of Employment Work Status for Purposes of State of California Employment Taxes and Personal Income Tax Withholding* (DE 1870), *Employment Determination Guide* (DE 38), DE 542, and various Information Sheets.

The DE 38 is a self-assessment worksheet to be used to determine whether a worker is most likely an employee or an independent contractor. The EDD will also provide verbal guidance or, if deemed necessary, a written opinion based on data provided by the

requesting State agency on the DE 1870. In most cases, an employment status determination results in the same finding under both the State and federal guidelines. In rare instances where the employment status is different under the State and federal guidelines, please consult with EDD's Audit Section for assistance.

STATE POLICY: CONTRACT WITH INDEPENDENT CONTRACTORS ONLY

After reviewing the contents of Attachment I and the statutory employee categories listed on page 3 of this article, the State agency program manager directly responsible for the work to be performed should determine whether the contract being reviewed creates or is likely to be executed in a manner that could create an employer/employee relationship outside the civil service system. State law and policy require that, except where exempted by the California Constitution, all State contracts should be executed in a manner consistent with the establishment of independent contractor status.

State agency contracts with common law employees **may be in violation** of Government Code Section 19130(c), which requires that:

All persons who provide services to the state under conditions the [State Personnel] board determines constitute an employment relationship shall, unless exempted from civil service by Section 4 of Article VII of the California Constitution, be retained under an appropriate civil service appointment.

Therefore, State program managers whose contracts appear to be less than fully consistent with this State policy should consult with EDD regarding employee and independent contractor determinations and with their agency's personnel manager regarding proper civil service or other classifications.

FEDERAL PENALTIES FOR INDEPENDENT CONTRACTOR/EMPLOYEE MISCLASSIFICATION

If the IRS determines that a contractor is, in fact, an employee, the penalty assessments against the offending State agency include:

- A liability for failure to withhold income taxes, equal to 1.5 percent of the wages plus 20 percent of the social security and medicare taxes that should have been paid by the employee.
- A liability for the unpaid portion of the employer social security and medicare taxes.
- A penalty for the State agency's failure to withhold 31 percent of a noncorporate independent contractor's pay if the contractor:
 - Was paid more than \$600 annually.
 - Did not provide a federal employer identification number to the State agency.
 - Failed to pay income taxes (the penalty is equal to 100 percent of what the contractor would have paid in taxes).

Depending on the number of independent contractor/employee misclassifications committed by a State agency and the length of time the misclassification remains uncorrected, the liabilities and the penalty assessments can be substantial.

State policy is that **federal penalties** incurred by a State agency **will be paid out of that agency's support appropriation.**

Therefore, to avoid the misclassification of a worker who signs a personal services contract, carefully apply the elements listed on Attachment I or contact EDD for assistance and/or to obtain additional information.

The Financial Integrity and State Manager's Accountability Act of 1983 (Government Code 13400 et seq.) makes the head of each State agency responsible for establishing and maintaining systems of internal control within their agency. Management's responsibility includes communicating the system requirements to employees and providing assurance that the system is functioning as prescribed. The objectives of a system of internal control are to safeguard assets, check the accuracy and reliability of accounting data, promote operational efficiency, and assure compliance with laws, regulations, and policies.

Although the responsibility for the internal control system cannot be delegated to an outside agency, assistance to determine that such systems exist may be provided by audits performed either by departmental internal audit functions or by the various control agencies. For example, EDD may conduct studies of policies and procedures related to employment requirements and tax administration. Also, the State Auditor, the State Controller, and the Director of the Department of Finance may perform reviews of State agencies' internal control systems to ensure that such controls are adequate to meet the objectives noted above.

If you have any questions regarding this article, please call EDD's Audit Section at (916) 464-2500.

JAMES R. LEGLER, Chief
Field Audit and Compliance Division, Central Operations
EDD Tax Branch

**INDEPENDENT CONTRACTOR/EMPLOYEE
STATUS DETERMINATION ELEMENTS – COMMON LAW**

| ELEMENTS | EMPLOYEE | INDEPENDENT CONTRACTOR |
|---------------------------------|---|--|
| 1. Instructions | A worker who is required to comply with instructions about when, where, and how to work is ordinarily an employee. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished. Some workers may perform services without receiving instructions because they are highly proficient and conscientious workers. Even if no instructions are given, the control factor is present if the employer has the right to give instructions. | An independent contractor decides how to do the job, establishes his or her own procedures, and is not supervised. The entity engaging his or her services is only interested in the end result. |
| 2. Training | Training of a worker by an experienced employee working with him or her, by correspondence, by required attendance at meetings, and by other methods is a factor of control indicating that the employer wants the services performed in a particular manner. This is especially true if the training is given periodically or at frequent intervals. | An independent contractor ordinarily uses his or her own methods and receives no training from the principal. He or she is not required to attend meetings. |
| 3. Integration | If the worker's services are so integrated into an employer's operations that the success or continuation of the business depends on the performance of the services, it generally indicates employment. | If the individual's performance of service and those of the assistants establish or affect his or her own business reputation and not the business reputation of those who purchase their services, it is an indication of an independent contractor relationship. |
| 4. Services Rendered Personally | If the services must be rendered personally, it indicates the employer is interested in the methods as well as the results. | An individual's right to substitute another's services without the principal's knowledge suggests the existence of an independent relationship. |
| 5. Hiring Assistants | A worker performs services for an employer who hires, supervises, and pays assistants. If a worker hires and supervises assistants at the direction of the employer, he or she is acting as an employee in the capacity of a foreman for or representative of the employer. | An independent contractor hires, supervises, and pays assistants under a contract that requires him or her to provide materials and labor. |
| 6. Continuing Relationship | The existence of a continuing relationship between a worker and the person for whom he or she performs services indicates an employer-employee relationship. If the arrangement consists of continuing or recurring work, the relationship is considered permanent, even if the services are rendered on a part-time basis, are seasonal in nature, or if the person actually works for only a short time. | The relationship between an independent contractor and his or her client ends when the job is finished. |

**INDEPENDENT CONTRACTOR/EMPLOYEE
STATUS DETERMINATION ELEMENTS – COMMON LAW**

| ELEMENTS | EMPLOYEE | INDEPENDENT CONTRACTOR |
|---------------------------|--|--|
| 7. Set Hours of Work | The establishment of set hours of work by the employer is a factor of control. If the nature of the occupation makes fixed hours impractical, a requirement that the worker work at certain times is an element of control. | An independent contractor is the master of his or her own time. |
| 8. Full-Time Work | Full-time work for the business is indicative of control by the employer since it restricts the worker from doing other gainful work. Full-time does not necessarily mean an eight-hour day or a five-day week. Its meaning may vary with the intent of the parties, the nature of the occupation, and the customs in the locality. These conditions should be considered in defining full-time. Full-time services may be required even though not specified orally or in writing. | An independent contractor is free to work when he or she chooses and to set his or her daily or weekly schedule. An independent contractor would normally perform services less than full time for one principal. |
| 9. Work Done on Premises | Doing the work on the employer's premises, on a route, or at a location designated by an employer implies employer control, especially where the work is of such a nature that it could be done elsewhere. The use of desk space and of telephone and stenographic services provided by an employer places the worker within the employer's direction and supervision unless the worker has the option as to whether he or she wants to use these facilities. However, the fact that work is done off the premises does not indicate freedom from control since some occupations (for example, construction workers) are necessarily performed away from the premises of the employer. | Doing work away from the principal's premises when it could be done on the principal's premises indicates a lack of control, especially when the work is free from supervision. |
| 10. Order or Sequence Set | If a worker must perform services in the order or sequence set by the employer, it shows that the worker is not free to follow an independent pattern of work but must follow the established routines and schedules of the employer. Often, because of the nature of the occupation, the employer either does not set the order of the services or sets them infrequently. Control is sufficiently shown, however, if the employer retains the right to do so. | If the principal is not interested in the order or sequence by which the individual completes the work, there is an indication that there is a lack of control over the manner and means by which the work is performed. |
| 11. Reports | The submission of regular oral or written reports indicates control since the worker must account for his or her actions. | An independent contractor is not required to file reports that constitute a review of his or her work. (However, reports related only to an end result are not an indication of employment or independence.) |

**INDEPENDENT CONTRACTOR/EMPLOYEE
STATUS DETERMINATION ELEMENTS – COMMON LAW**

| ELEMENTS | EMPLOYEE | INDEPENDENT CONTRACTOR |
|-------------------------|---|---|
| 12. Payments | <p>Payment by the hour, week, or month generally represents an employer-employee relationship</p> <p>The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings tends to indicate the existence of an employer-employee relationship.</p> | <p>Payment on a commission or job basis is customary where the worker is an independent contractor. Payment by the job includes a lump sum computed by the number of hours required to do the job at a fixed rate per hour.</p> |
| 13. Expenses | <p>Payment of the worker's business and travel expenses by the employer indicates control over the worker.</p> | <p>A worker who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor. Since the person is accountable to no other person for the expenses, the person is free to work according to his or her own methods and means.</p> |
| 14. Tools and Materials | <p>The furnishing of tools, materials, etc., by the employer indicates control over the worker. In some occupations and industries, it is customary for workers to provide their own tools, which are usually small hand tools; in that case, workers may be considered to be employees.</p> | <p>When a worker furnishes tools and materials, especially when a substantial sum is involved, there is an indication of independence.</p> |
| 15. Investment | <p>The furnishing of all necessary facilities by the employer tends to indicate an employment relationship.</p> <p>Facilities generally include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are commonly provided by employees in their particular trade.</p> | <p>A significant investment by the worker in facilities used by him or her in performing services for another tends to show independent contractor status.</p> <p>In order to be significant, the investment must be real, essential, and adequate.</p> |

**INDEPENDENT CONTRACTOR/EMPLOYEE
STATUS DETERMINATION ELEMENTS – COMMON LAW**

| ELEMENTS | EMPLOYEE | INDEPENDENT CONTRACTOR |
|---------------------------|---|--|
| <p>16. Profit or Loss</p> | <p>When workers are insulated from loss or are restricted in the amount of profit they can gain, they are usually employees. The opportunity for higher earnings, such as from pay on a piecework basis or the possibility of gain or loss from a commission arrangement, is not considered profit or loss.</p> | <p>The possibility of a profit or loss for the worker as a result of his or her services generally shows independent contractor status. Profit or loss implies the use of capital by the worker in an independent business. Whether a profit is realized or loss suffered generally depends on management decisions; that is, the one responsible for a profit or loss can use his or her own ingenuity, initiative, and judgment in conducting the business or enterprise. Factors that affect whether or not there is a profit or loss are whether the worker:</p> <ul style="list-style-type: none"> • Hires, directs, and pays assistants. • Has his or her own office equipment, materials, or other facilities for doing the work. • Has continuing and recurring liabilities or obligations. • Succeeds or fails depending on the relation of his or her receipts to his or her expenditures. • Agrees to perform specific jobs for prices agreed upon in advance. • Pays expenses incurred in connection with the work. <p>Independent contractors typically can invest significant amounts of time or capital in their work without any guarantee of success.</p> |

**INDEPENDENT CONTRACTOR/EMPLOYEE
STATUS DETERMINATION ELEMENTS – COMMON LAW**

| ELEMENTS | EMPLOYEE | INDEPENDENT CONTRACTOR |
|--|--|--|
| 17. Works for More Than One Person or Firm | It is possible that a person may work for a number of people or firms and still be an employee of one or all of them because he or she works under the control of each firm. | Work for a number of persons or firms at the same time usually indicates an independent contractor status because the worker is usually free, in such cases, from control by any of the firms. |
| 18. Offers Services to the General Public | If a worker performs services for only one person, does not advertise his or her services to the general public, does not hold licenses or hire assistants, and performs services on a continuing basis, it is an indication of an employment relationship. | The availability of services to the general public usually indicates independent contractor status. This may be evidenced by the worker having his or her own office and assistants, hanging out a "shingle" in front of his or her own home or office, holding business licenses, maintaining business listings in telephone directories, or advertising in newspapers, trade journals, magazines, etc. |
| 19. Right to Fire | If an employer has the right to discharge an individual at will and without liability, that worker is considered an employee. The employer exercises the control through the ever present threat of dismissal, which causes the worker to obey instructions. A restriction on the employer's right to discharge in a labor union contract does not detract from the existence of an employment relationship. | An independent contractor cannot be discharged as long as he or she produces a result that measures up to his or her contract specifications. However, the relationship can be terminated with liability. |
| 20. Right to Quit | The right to quit at any time without incurring liability indicates an employer/employee relationship. | An independent contractor usually agrees to complete a specific job, and he or she is responsible for its satisfactory completion or is legally obligated to make good for failure to complete the job. |
| 21. Custom in Industry and Location | If the work is traditionally done by civil service employees under the direction of a supervisor, it is an indication of employment. | If the work is done by outside specialists, it is an indication of independence. |
| 22. Required Level of Skill | A low level of technical skill is strong evidence of employment, since as the skill level declines, there is less room to exercise the discretion necessary for independence. | A high level of technical skill is important when combined with other factors such as owning a separate and distinct business. |

**INDEPENDENT CONTRACTOR/EMPLOYEE
STATUS DETERMINATION ELEMENTS – COMMON LAW**

| ELEMENTS | EMPLOYEE | INDEPENDENT CONTRACTOR |
|---------------------------|--|---|
| 23. Belief of the Parties | <p>It is an indication of employment if:</p> <ul style="list-style-type: none"> • Both parties (the worker and the State) believe the relationship is employment. • Either party believes that the relationship is employment. | <p>If the parties agree that the relationship is one of independence, it may be. However, consideration should be given to the fact that many individuals do not know how employment determinations are made and believe they are independent contractors because they are told they are.</p> |
| 24. Business Decisions | <p>Employees cannot make business decisions that would enable them to earn a profit or incur a financial loss.</p> | <p>Independent contractors make business decisions that enable them to earn a profit or incur a loss. Investment of the worker's time is not sufficient to show a risk of loss.</p> |

EMPLOYMENT LAW

How Employers Lose Lawsuits

BY STEVEN M. SCHNEIDER

California has its own unique, and growing, employment law requirements. And the cost to employers who fail to comply with them can be staggering, as Farmers Insurance learned recently upon being hit with a verdict in excess of \$93 million—all but approximately \$1 million of which was affirmed on appeal—for not paying overtime to its claims adjusters.

Here are some common employer attitudes that can result in wage-and-hour and other employment law actions.

IT'S JUST A ONE-PERSON CLAIM

The *Cortez* case is a good example of the harm that can arise from a single employee's charge. In *Cortez v. Purolator Air Filtration Prods. Co.* (23 Cal. 4th 163 (2000)), Rosalba Cortez had worked for her employer for several years before being terminated. Cortez had been working a ten-hour workday, four days a week. When the employer was unable to provide documentation for such an alternative schedule as required under state law, Cortez sued under California's Unfair Business Practices Act (Cal. Bus. & Prof. Code § 17200), claiming unpaid overtime for herself and approximately 175 other employees.

Section 17200 allows a plaintiff to assert a representative action on behalf of the general public for alleged unfair competition—including "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising." An

employer who does not comply with California's wage-and-hour law requirements is deemed to gain a business advantage over competitors who do follow the law, which qualifies as a claim under section 17200.

The California Supreme Court ruled that not only was Cortez entitled to overtime pay but also the other employees were entitled to restitution authorized by section 17200. This decision demonstrates that what an employer might initially view as a nuisance claim brought by one person can be transformed into a class-type lawsuit.

In addition, employers should pay particular attention to the following areas, which are fertile fields for lawsuits.

Policies that may affect many. The mere fact that most employees do not complain about a workplace policy does not guarantee that one complaint will not lead to a multitude of claimants. An employment class action or section 17200 representative lawsuit can include not only current employees but also former employees within the four-year statute of limitations period (*Cortez*, 23 Cal. 4th at 178-79), as well as those who were discouraged from applying for certain jobs because of an employer policy. (*Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000).)

Decentralized hiring. People tend to gravitate to those who share their backgrounds and traits, or follow practices they have used previously, but over time these human tendencies can create racial or gender segregation. For example, in *Sandoval v. Saticoy Lemon Ass'n* (747 F. Supp. 1373 (C.D. Cal. 1990)), a lemon-packing plant simply hired workers who asked supervisors for work. The supervisors assigned jobs largely along gender lines, with women working almost exclusively as graders, packers, sorters, and carton formers; men usually performed as general laborers, forklift operators, night watchmen, and equipment operators. In addition to the female workers currently employed, the court certified subclasses of female applicants who had been rejected or deterred from applying because of their awareness of Saticoy's allegedly discriminatory policies.

Dangerous safety policies. Systematically assigning certain duties to one gender based on assumptions

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Sparta finally went to war in 432 B.C. Neither was actually in danger. Rather, they endangered themselves by going to war to prevent future dangers. During the first ten years, Pericles used all his powers to advocate a defensive strategy for Athens, but as the years wore on, his caution was replaced by the aggressive stance of those Kagan describes as "new men," people who had acquired their wealth and power through trade and industry, representing a challenge to the old landed aristocracy and a shift in the nature of Greek society.

What Thucydides called a "festering peace" was struck in 421 B.C. by the Athenian leader Nicias, a decent man whose blunders eight years later during the invasion of Sicily led to a catastrophic Athenian defeat. "It is senseless to go against people who, even if conquered, could not be controlled," he argued in an attempt to dissuade his countrymen from attacking Sicily. His

nemesis, Alcibiades, countered with a cogent defense of imperialism: "The city, like everything else, will wear out of its own accord if it remains at rest." When Nicias sensed he was losing the debate, he switched tactics and tried to strike fear into the Athenians by exaggerating Sicily's strength. That only gave the hawks the ammunition they needed to propose an all-out invasion, and the disaster was launched. It ended up being one of the great historic examples of military hubris.

Athens somehow fought on for nine more years. There were a series of coups in the city in 411 B.C., the year Aristophanes' great antiwar farce, *Lysistrata*, was first performed and also the year in which Thucydides' account ends. The war, in fact, lasted until 404 B.C., and Kagan does readers a service by taking them the whole way. Spartan despots ruled Athens for just one year after the war before they were thrown out. And then, once again, the Athenians

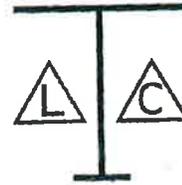
astonish us. Rather than commencing to blame one another for the mistakes and the betrayals of the past, they issued an amnesty, reestablished democracy, and went back to being highly cultured and powerful for nearly another 100 years.

Kagan's book contains many useful maps and an afterword about the few ancient sources available to us, which Kagan uses to supplement Thucydides. Thucydides, himself a participant in the war, had access to these and, presumably, other direct accounts, but he relied on none of them, trusting instead his memory and that of other witnesses. "My work," he famously wrote, "is not a piece of writing designed to meet the taste of an immediate public, but was done to last forever." Kagan's readable and solid account of the war ensures that readers will continue learning about the Peloponnesian War, if not forever, then at least for a very long time. —Ruth MacKay 

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about strength, physical ability, or desire for the work may also be viewed as discriminatory. For example, in *Int'l Union, United Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.* (499 U.S. 187 (1991)), a battery manufacturer prohibited placing women who were pregnant or capable of bearing children in jobs that might expose them to lead. The employer promulgated this rule after eight employees became pregnant while maintaining blood levels of lead in excess of the level deemed critical by government authorities for workers planning to have families. The U.S. Supreme Court held that the rule was facially discriminatory since it applied only to women and not to men, whose lead exposure might also have affected their fertility.

The power of the EEOC. A single employee complaint to the Equal Employment Opportunity Commission (EEOC) alleging discrimination can trigger the agency's decision to file a representative action on behalf of a group of employees. (*EEOC v. Dinuba Med. Clinic*, 222 F3d 580 (9th Cir. 2000).) Although such EEOC actions carry a maximum per-employee damages limit that does not apply to California claims, as with section 17200 representative lawsuits, they do not impose the stringent procedural requirements that apply to class actions.

FEDERAL LAW SAYS WE CAN DO THIS

One major mistake California employers can make is to assume they only have to comply with federal employment law, not with state laws on the same subject matter. The truth is that when faced with conflicting federal and state employment legislation, employers usually must comply with the more employee-protective laws. (See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996).) California has a number of them.

Meal penalties. The federal Fair Labor Standards Act (FLSA) does not require employers to provide any meal periods. However, with a few exceptions, California law requires employers to provide a meal period of at least 30 minutes to employees who work at least five

hours a day, and a second meal period to employees who work at least ten hours a day. (Cal. Lab. Code § 512.) Employers risk penalties of one hour of additional pay for each missed meal period, in addition to paying for on-duty meal periods. (Cal. Lab. Code § 226.7.)

Professional exemption for nurses. Under the FLSA, registered nurses are usually exempt from overtime under the executive, administrative, or professional exemption—although whether the professional exemption will continue under federal overtime regulations effective August 23, 2004, is still uncertain. Under California law, the professional exemption generally is not available to registered nurses, with only limited exceptions. (Cal. Lab. Code § 515(f).)

Disability discrimination. Under the federal Americans With Disabilities Act (ADA), a disability must be an impairment that *substantially limits a major life activity*. (42 U.S.C. § 12102(2).) Under the California Fair Employment and Housing Act, under which most claims here are filed, the impairment simply has to be a *limitation*. (Cal. Gov't Code § 12926.1(c) and (d)(2).) Also under federal law, when determining whether an individual is substantially limited in a major life activity, mitigating measures—such as medication, equipment, eyeglasses, and hearing aids—must be taken into account. (*Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).) State law does not consider mitigating measures. (Cal. Gov't Code § 12926.1.)

THAT'S THE CONTRACTOR'S RESPONSIBILITY, NOT OURS

Two or more businesses that exercise control over working conditions may be deemed *joint employers*—individually responsible for complying with employment laws controlling the workers they employ. That means that a company found to be a joint employer of a group of workers may be held liable for back wages for overtime and minimum-wage violations. The company may also be liable for interest on the wages due, attorney's fees, court costs, and penalties for failing to pay the employees on time—

even if another entity hired them, supervised them, and had the responsibility to pay them. (Cal. Lab. Code §§ 98.1, 203, 210, 218.5, 1193.6, and 1194; A.B. 223 and 276; and S.B. 179.)

An entity will qualify as a joint employer if it satisfies the legal definition of an employer: in California, someone who “employs or exercises control over the wages, hours, or working conditions of any person.” (Cal. Indus. Welfare Comm'n Wage Order 4, § 2(H).) The federal definition includes any person acting “in the interest of an employer in relation to an employee.” (29 U.S.C. 203(d).) Not surprisingly, the courts do not rely on either of these vague definitions when determining whether an entity qualifies as an employer or joint employer. Instead, they often apply a multifactor “economic-realities” test. (*Bureerong v. Uyawas*, 922 F. Supp. 1450, 1467–71 (C.D. Cal. 1996).) Under this test, the more dependent a worker is on an entity, the more likely the entity will be considered the worker's employer or joint employer.

In examining the economic realities indicating workers' dependence, courts concentrate on whether the employing entity:

1. has the power to hire and fire the workers
2. supervises or controls work schedules or employment conditions
3. determines the rate and method of payment, and
4. maintains employment records for the workers.

When courts have found joint employers. Courts have repeatedly emphasized that the term *employer* is defined broadly when applying the economic-realities test. (*Torres Lopez v. May*, 111 F3d 633, 639 (9th Cir. 1997).)

A finding of all four of the factors listed above suggests that the entity will qualify as an employer. (*Bonnette v. California Health & Welfare Agency*, 704 F2d 1465, 1469–70 (9th Cir. 1983)). However, even in their absence, a court might still consider an entity to be an employer or joint employer. For example, in *Antenor v. D & S Farms* (88 F3d 925, 938 (11th Cir. 1996)),

the court found that a company could qualify as a joint employer even though another company had hired the workers and assigned them jobs, directly supervised them, disciplined and discharged them, and paid their wages.

Furthermore, the four factors are not exhaustive. For example, in *Rutherford Food Corp. v. McComb* (331 U.S. 722, 729 (1947)), the U.S. Supreme Court found that workers were employees of a company because they had been sufficiently "integrated" into that company's production force. Courts also find joint employers when two companies share an employee's services. In *MidContinent Pipe Line Co. v. Hargrave* (129 F.2d 655, 658-59 (10th Cir. 1942)), the court held that a petroleum company and its carrier jointly employed security personnel when the two companies used the personnel to protect their property during a labor strike.

California recently enacted its own unique law regarding joint employers. (S.B. 179.) That statute imposes liability and civil penalties on "any person or entity" that enters into a "contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor" and knows or should know that the contract does not include sufficient funds to allow the contractor to comply with federal, state, and local laws and regulations governing the labor or services to be provided. Aggrieved employees can sue for the greater of actual damages or \$250 per employee per initial violation and \$1,000 per employee per subsequent violation, plus attorneys fees and costs.

YOU'RE NOT OUR EMPLOYEE, YOU'RE AN INDEPENDENT CONTRACTOR

An independent contractor is a self-employed worker hired to perform services for another. Hiring parties have numerous obligations to employees that they do not owe their independent contractors. The label applied, however, is not

dispositive of worker status, which must often be determined in a lawsuit. Some courts will even disregard written agreements workers have signed acknowledging their independent contractor status.

Right-to-control test. The right-to-control test focuses on the control the hiring party has over the services performed by the worker. This test is generally used by the Internal Revenue Service and California's Employment Development Department to determine liability for employment and payroll taxes. It is also used by many other state tax, unemployment, and workers compensation authorities and by the courts in a variety of contexts, including most civil rights actions.

The economic-realities test. This test, usually applied in FLSA wage-and-hour cases, focuses on the extent to

“ Systematically assigning certain duties to one gender based on assumptions about strength or desire may also be viewed as discriminatory. ”

which the worker is economically dependent on the hiring party.

YOU DON'T GET OVERTIME BECAUSE YOU'RE A MANAGER

It can be a costly mistake to assume that an employee who happens to have the word *manager* or *administrator* in his or her job title is exempt from state overtime laws. The California exemptions require a two-part analysis: *the salary-basis test* and *examination of employee duties*. The salary-basis test requires a showing that the employee receive a fixed salary that currently totals at least \$2,340 per month, which is two times California's minimum wage for full-time employment. An employer slipup could result in loss of exempt status and liability for unpaid overtime.

Presuming that a manager meets California's salary-basis test, the next step is to determine whether he or she is primarily engaged in the duties that meet one of the articulated exemptions, such as the administrative, executive, or professional exemption. This test is anything but precise. For example, for California's executive employee exemption to apply, a worker must:

1. manage the company or a recognized department or subdivision
2. customarily and regularly direct the work of two or more employees
3. have the authority to hire, fire, discipline, or promote
4. customarily and regularly exercise independent judgment, and
5. be engaged in the above duties for more than half of his or her working time.

Under California law, the most relevant duties are those *actually performed by the employee*—a critical inquiry for employees with borderline status. For example, a manager who underperforms and as a result primarily engages in clerical tasks instead of managing could be determined to be misclassified as exempt. (*Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785 (1999).)

Another common pitfall is to assume that an employee properly classified as exempt from overtime provisions under federal law is also exempt under California law. Many of the exemptions are titled the same and largely include the same elements; however, the application of those tests differs significantly. For example, federal law evaluates the exemptions discussed above on a *qualitative* basis, examining the employee's primary duty, while California law takes a *quantitative* approach, focusing on the actual time spent performing exempt and nonexempt tasks. (*Ramirez v. Yosemite Water Co.*, 20 Cal. 4th at 797.) Specifically, California law requires that an employee qualifying for the executive, administrative, or professional exemption spend "more than one-half of the employee's worktime" on exempt tasks. (Cal. Lab. Code § 515(2)(e).) 