Ennis Britton Co., L.P.A.
Attorneys at Law
Cincinnati • Cleveland • Columbus

ENNIS BRITTON

School Law Review

**August 2015**



## Department of Labor Issues "Administrator's Letter" Commenting on Identification of Independent Contractors versus Employees

On July 15, 2015 the U.S. Department of Labor ("DOL") issued new guidelines indicating a move away from the "common law control test" to focus instead on the "economic realities" test when determining employee status. Employees who are classified as independent contractors are not entitled to minimum wage, overtime compensation, unemployment insurance, and workers' compensation.

Courts use a multi-factorial "economic realities" test to determine if a worker is an employee or independent contractor under the Fair Labor Standards Act ("FLSA"). An employee is economically dependent on the employer and an independent contractor is in business for him or herself.

No one factor alone is sufficient to determine the economic realities of the worker and employer's relationship. Some courts recognize more or less factors. The Sixth Circuit recently applied the economic realities test using six factors and held that FLSA claims should be tried by a jury. The factors include: whether the service rendered is an integral part of the employer's business, the worker's opportunity for profit or loss, the worker's investment in equipment and materials, the degree of skill required, the permanency of the relationship, and the degree of the employer's right to control the manner in which work is performed.

*Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015).

**Cincinnati**: 1714 West Galbraith Road • Cincinnati, OH 45239 • (513) 421-2540 • Toll-Free Number: 1 (888) 295-8409
**Cleveland**: 6000 Lombardo Center • Suite 120 • Cleveland, OH 44131 • (216) 487-6672
**Columbus**: 300 Marconi Boulevard • Suite 205 • Columbus, OH 43215 • (614) 705-1333

**www.ennisbritton.com** | **www.twitter.com/EnnisBritton** | **www.linkedin.com/company/ennis-britton-co-lpa**

A worker is more likely to be considered economically dependent on the employer if their work is integral to the employer's business. Work is considered integral if it is the primary work of the employer even if it is only one component of the business. Significant relative investments of the employer and worker can also determine worker status by looking at the nature of the investment and comparing the employer's investment to the worker's investment. A worker that makes an investment in facilities and equipment necessary for the work and undertakes the risk of a loss is more likely to be considered an independent contractor.

Workers that lack economic independence are more likely to be employees, they are told what to work on and when and where to do it. An independent contractor has more flexibility in determining the timing, method and manner of the work. Technical skills are not indicative of economic dependence as employees and independent contractors both may use specialized skills in their work.

Permanency of a work relationship can indicate economic dependence. A worker in an indefinite relationship with the employer is more likely to be an employee. However, lack of permanence does not automatically suggest independent contractor status. Some workers are still considered employees if they work part-time, are employed through staffing agencies, or work seasonal jobs.

The last factor of the economic realities test concerns the nature and degree of control exercised by the employer. A worker with control over a meaningful part of the business likely stands as a separate economic entity in that he or she is conducting his or her own business in service to the employer. A worker that works at home is not necessarily an independent contractor even though they control their work hours. Employers do not have to be constantly looking over its workers' shoulders to have control.

**How this affects your district:**

Cases of misclassification are increasingly reaching trial where litigation can be costly. Employers may face fines and penalties for misclassification. Employers may also be fined for filing a 1099 form instead of a W-2 form for each misclassified employee. These penalties can be backdated up to three years per employee. Misclassified employees may also request unpaid overtime and other benefits from the employer.

Employers that intentionally misclassify their employees may face criminal charges that could result in monetary fines or prison time. Be careful in analyzing the employment relationship in determing whether a particular worker is an independent contractor or an employee. Be sure to analyze the entire relationship. Who controls the area where the work is performed? Who dictates how and when the work is performed? Is compensation paid on a regular basis or on some other basis? If there is still uncertainty, please contact an Ennis Britton attorney for further analysis.

## Notice of Appeals to the Board of Tax Appeals Are Not Required to Contest Both the Value of Land and Improvements

Polaris Amphitheater Concerts, Inc. ("Polaris") owned five parcels of land and petitioned to have structural improvements on the land characterized as personal property instead of real property which was ultimately rejected by both the Board of Revision ("BOR") and the Board of Tax Appeals ("BTA"). Approval of the petition would have drastically reduced the assessed property value by eliminating the portion of value associated with the improvements.

While Polaris did not appeal the decision regarding the inclusion of the improvements in the real property tax base, it did appeal the specific amount of value assigned to the land by the BTA. Polaris argued that its own expert appraisal of the land and the Olentangy Board of Education's expert appraisal were both substantially lower than the value determined by the BTA. On appeal, Polaris asked that the court reverse the BTA's decision as their finding of land value was not supported by probative evidence.

The BOR opposed Polaris' request for reversal for two reasons: lack of jurisdiction and lack of error in determining the total value of the property. The Board argued that Polaris' notice of appeal did not contest the finding of the total value of property. According to the Board, the total value of property includes both land and improvements but Polaris only contested the value of the land. Because of this, the Board argued that Polaris needed to appeal the valuation of the land and improvements in order for the court to have jurisdiction.

The court rejected the Board's first argument as any issue stated in a notice of appeal defines the scope of jurisdiction. An appeal arguing the total value of the property does not necessarily mean that both the land and improvement values are at issue. Therefore, Polaris was within its rights to file an appeal challenging just the land valuation.

For the second issue, the Board argued that any error in assigning value to the land was likely the result of an error in allocation of value. The total value of the land was correct even though individually the value of the land and the value of the improvements were not. Thus, the resulting taxes that Polaris owed would not have changed. Polaris argued that the Board would have had to file a cross-appeal alleging that the error in land valuation was offset by the error in allocation of values. The court agreed with Polaris and rejected the Board's argument on this issue as well.

The court stated the record showed no evidence in support of the BTA's estimated land value. The estimations from Polaris and the Board contradicted the BTA's total valuation. Because of this, the court reversed the BTA's decision and remanded the case for additional factual determination. The court noted that the Board's failure to file a cross-appeal limited their jurisdiction and the BTA's jurisdiction on remand.

*Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454.

**How this affects your district:**

A decrease in property value negatively affects the amount of property tax paid which decreases the amount allocated to school districts. According to the court, if the Olentangy Board of Education had filed a cross-appeal explaining how they valued the land, the court would have had jurisdiction to consider the matter.

## Court Rules Insufficient or Unjustified Cause to Suspend Teaching License or Terminate Teaching Contract

In two recent decisions relating to education, the Third District Court of Appeals of Ohio overruled the termination of one teacher and the suspension of another for insufficient or unjustified causes. In the first case, the court overruled the State Board's action to suspend the teaching license of one of its employees.

Because of her actions during an incident involving a vehicle, a teacher was charged with criminal damaging, a second-degree misdemeanor, and unlawful restraint, a third-degree misdemeanor. She pled guilty to the lesser offense of disorderly conduct and was fined, served five days in jail, and was ordered to attend counseling. The following year, the Ohio Department of Education notified her of its intent to suspend or revoke her five-year professional teaching license due to conduct unbecoming of a teacher in violation of Ohio law.

In the hearing that followed, the hearing officer determined that the nature of the incident posed no risk to students, that the incident did not occur on school property, and that the teacher had successfully completed the terms of her sentence and probation. The recommended action of the hearing was that the teacher be issued a letter of admonishment. The Department then filed an objection to the hearing officer's recommendation. The State Board adopted a resolution that suspended the teacher's license for approximately six months. The teacher appealed.

The trial court ordered that the State Board's resolution be reversed because reliable, probative, and substantial evidence was not shown to prove a nexus between the teacher's conduct and her performance as a teacher. The State Board appealed this decision on the basis that the Revised Code and Administrative Code do not discuss demonstrating a nexus as a requirement under sections 3319.31 and 3301-73-21, respectively. The State Board also argued that the trial court failed to properly apply the nexus standard in conjunction with the Licensure Code of Professional Conduct. The appellate court affirmed the decision of the trial court.

The court reasoned that the State Board did not present any evidence of a nexus between the teacher's misconduct and her ability to teach. Without reliable, probative, or substantial evidence, it was reasonable that the hearing officer concluded there was no nexus. The conduct in some way has to relate to a teacher's ability to teach. While the State Board rejected the hearing officer's recommendation, they did not replace it with findings of their own. Since the State Board did not make an argument concerning the Licensure Code of Professional Conduct in trial court, they waived the right for appellate review of any argument pertaining to the Licensure Code.

*Wall v. State Bd. of Edn.*, 2015-Ohio-1418.

In the second case, the court found that the actions of a student while the teacher was outside of the classroom attending to other students did not justify the termination of the teacher's contract.

In this case, a student engaged in "horseplay" and placed two students in a chokehold while the teacher was in another classroom assisting a small group of students. The first chokehold lasted a few seconds and the second lasted thirty-seven seconds. The second chokehold was placed on a special needs student who lost consciousness for a short period. The teacher was out of the room for six minutes assisting seniors with an exam.

Later in the day, a few of the teacher's students expressed concern for the special needs student and informed a teacher's aide of the incident. The aide reported the incident to the principal who conducted a brief investigation and viewed the video recordings of the classroom. The following day a Notice of Investigatory Hearing was sent to the teacher. After the investigatory hearing, the teacher met with the superintendent to discuss the findings of the hearing. Following the meeting, a Notice of Intent to Terminate was sent to the teacher stating ten grounds for termination based on "willful and persistent violations" of school policies. The notice alleged that the teacher had repeatedly failed to supervise students in his classroom in an appropriate manner. The notice only mentioned the single incident involving the chokeholds and gave no other examples of any failure supervising students in an appropriate manner.

The teacher demanded that an impartial referee conduct a hearing in regards to the matter. The superintendent sent an "Educator Misconduct" report to the Department of Education indicating that the basis of their investigation relied solely on the incident involving the chokeholds. After the hearing with the impartial referee, the referee issued his report. The referee recommended that the Board of Education reinstate the teacher and reimburse him for back pay and lost benefits. The referee concluded that the Board failed to provide any evidence of the teacher's "willful and persistent violations" of school policies.

The Board ultimately voted four-to-one to reject the referee's report and determined that "good and just cause" existed to terminate the teacher's contract. The teacher filed a complaint with the Court of Common Pleas. The trial court reversed the Board's decision and ordered the Board to reinstate the teacher's employment contract and pay lost salary and benefits. The Board appealed this decision. The appellate court affirmed the trial court's decision citing a lack of documentation of any other incidents of teacher misconduct. With no documentation that the teacher was notified that his conduct in any prior disciplinary issues were violations of school policy, the trial court had to make its decision based only upon the chokehold incident. The trial court found that the teacher's room arrangement was unusual and offered a challenge in supervising all the students at once. The appellate court agreed; they determined that multiple variables outside of the teacher's control led to the chokehold incident. The Board failed to provide any evidence of the teacher's misconduct that would have indicated good and just cause for termination of his employment contract.

*Badertscher v. Liberty-Benton School Dist. Bd. Of Edu.*, 2015-Ohio-144.

**How this affects your district:**

A Board cannot terminate a teaching contract based on off-campus conduct unless it can establish a clear nexus between the behavior and the teacher's ability to teach. A teacher cannot lose his or her contract because of misconduct if the actions have no connection to his or her teaching performance. The court determined that the appropriate course of action was a letter of admonishment, not termination.

Documentation and clarity are key. If a teacher faces disciplinary action, make note of it and be clear with the teacher of possible consequences arising from the situation. A Board cannot choose to terminate a contract without good and just cause. In the *Badertscher* case, there were allegations of previous school policy violations but no documented record.

## Sixth Circuit Court Rules that Parents Must Exhaust All Administrative Remedies to IDEA before Filing Suit against School District

An elementary student with cerebral palsy needed her service dog to assist her with basic tasks and mobility. In an effort to develop a bond between the child and her service dog, her parents requested permission for her dog to accompany her at school. In an IEP meeting, the elementary school stated that it already provided her with a human aide and refused. The dog was eventually allowed to accompany the girl on a trial basis until the end of the school year but was not permitted to return the following school year. Subsequently, for approximately two years the girl was homeschooled by her parents who filed a complaint with the OCR during this time. OCR found that the school's refusal to permit the service dog to attend school with the child was a violation of the ADA. The school agreed, but by that time the parents had already made the decision to transfer her to another district where her dog was permitted to accompany her.

The parents filed suit against the district, the school, and its principal seeking damages for denial of equal access to school facilities, denial of the use of the service dog, interference with the child's ability to form a bond with her service animal, denial of the opportunity to interact with other students at school, and psychological harm caused by the school's refusal to accommodate the child as a disabled person.

The district court dismissed the suit, finding that the IDEA's exhaustion requirements applied to the parent's claims. The court noted that because the parents did not allege any flaw in their child's IEP, modifications to her IEP could be made if she was permitted to attend school with her service dog.

The circuit court, on appeal by the parents, upheld the dismissal, finding that all administrative procedures must be exhausted for alleged injuries to be remediated through IDEA. The core harms alleged by the parents arose from the school's refusal to permit their child to attend school with her service dog. The circuit court declared these alleged harms relate to the specific educational purpose of the IDEA and that IDEA procedures could have been used to resolve the dispute.

Further, the court stated that complex factual disputes of the education of disabled children are to be resolved, or at least analyzed, through specialized local administrative procedures because the primary purpose of IDEA is to ensure that all children with disabilities have a free appropriate public education. Emphasizing that any party can present a complaint regarding FAPE and disputes over the content of the child's IEP, the court stated that such a dispute about an IEP should go through the formal resolution process before being heard in court.

Because the IDEA calls for a highly-fact intensive analysis of a child's disability and the school's ability to accommodate him or her, the parents and educators must be first to conduct this analysis. The court declared that it had "no expertise in the educational needs of handicapped students" and that utilizing the processes set forth in IDEA was the most logical approach to accommodation. If the parents had pursued IDEA procedures, the court reasoned, they would have prevailed and resolved their dispute such that their daughter would have been able to attend school with her service dog, or they would have failed but in the process would have generated an administrative record that would have aided the district court.

*Fry v. Napoleon Cnty. Sch.*, No. 14-1137 (6th Cir. June 12, 2015).

**How This Affects Your School**

OCR has found that an IEP team should carefully consider and document its decisions regarding the provision of a service animal at school as part of the student's IEP. If a conflict arises, documentation is essential. Both districts and parents must follow the requirements and administrative procedures of the IDEA. If the student does not have a 504 or an IEP, districts should consider evaluation to accommodate requests to meet student needs.

## Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- **August 24** – Last day to file (by 4 PM) as a write-in candidate for November general election (RC 3513.041)

- **September 1** – Last day to verify whether the district has uncollected taxes and request the county auditor to certify the information concerning the district's property values and taxes for the second preceding tax year (RC 3317.0211)
- **September 1** – Last day for the department to make the initial determination of satisfactory achievement and progress (RC 3317.40)
- **September 7** – Labor Day
- **September 15** – Last day for teachers who have completed training qualifying them for a higher salary bracket to file with the treasurer of the board of education of the completion of such additional training (RC3317.14)
- **September 30** – Last day to file resolution specifying district's intent not to provide career-technical education to students enrolled in grades seven and eight in order for the department to waive the requirement (RC 3313.90)
- **September 30** – Last day for the department of education to compute and pay additional state aid for preschool special education children to each city, local, and exempted village school district (3317.0213)

## Upcoming Presentations

**September 25 – Special Education Law, NBI-Cleveland**

Presented by: Jeremy Neff

**Follow Us On Twitter: @EnnisBritton**

**Want to stay up-to-date about important topics in school law? Check out Ennis Britton's Education Law Blog at [www.ennisbritton.com/education-law-blog](www.ennisbritton.com/education-law-blog).**

**Webinar Archives**

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@ennisbritton.com or 513-421-2540. Archived topics include:

- Managing Workplace Injuries & Leaves of Absence
- Special Education: Challenging Students,Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Levies & Bonds
- OTES & OPES Trends & Hot Topics
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Student Discipline
- Media and Public Relations

# *Ennis Britton Practice Teams*

## Construction/Real Estate

Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation

**Team Members**

Bronston McCord
Ryan LaFlamme
Gary Stedronsky

## Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPA's, General Advice

**Team Members**

Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

## Special Education

Due Process Claims, IEP's, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

**Team Members**

John Britton
Lisa Burleson
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Giselle Spencer
Erin Wessendorf-Wortman

## School Finance

Taxes, School Levies, Bonds, Board of Revision

**Team Members**

John Britton
Lisa Burleson
Bill Deters
Bronston McCord
Gary Stedronsky
Jeremy Neff
Hollie Reedy
Megan Bair Zidian

# *Attorney Directory*


**John Britton**
6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6673
C: 216.287.7555
Email: jbritton@ennisbritton.com

**Lisa M. Burleson**
300 Marconi Boulevard, Suite 205
Columbus, Ohio 43215
P: 614.705.1332
C: 614.406.1969
Email: lburleson@ennisbritton.com

**William M. Deters II**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.200.1176
Email: wmdeters@ennisbritton.com

**J. Michael Fischer**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.910.6845
Email: jmfischer@ennisbritton.com

**Ryan M. LaFlamme**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.310.5766
Email: rlaflamme@ennisbritton.com

**Pamela A. Leist**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.226.0566
Email: pleist@ennisbritton.com

**C. Bronston McCord III**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.235.4453
Email: cbmccord@ennisbritton.com

**Jeremy J. Neff**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.460.7579
Email: jneff@ennisbritton.com

**Hollie F. Reedy**
300 Marconi Boulevard, Suite 205
Columbus, Ohio 43215
P: 614.705.1331
C: 614.915.9615
Email: hreedy@ennisbritton.com

**Giselle Spencer**
6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6674
C: 216.926.7120
Email: gspencer@ennisbritton.com

**Gary T. Stedronsky**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.886.1542
Email: gstedronsky@ennisbritton.com

**Erin Wessendorf-Wortman**
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.375.4795
Email: ewwortman@ennisbritton.com

**Megan Bair Zidian**
6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6675
C: 330.519.7071
Email: mzidian@ennisbritton.com

**Cincinnati Office**: 513.421.2540

**Cleveland Office**: 216.487.6672

**Columbus Office**: 614.705.1333