

# Contracting Out with Certainty: Understanding Professional Experts and Personal Services Contracts

Association of Chief Human Resources Officers/Equal Employment Officers (ACHRO/EEO) 2023 Fall Institute  
October 17, 2023

Presented By: Sokha Song, Alexis Carter, Pilar Morin & Alysha Stein-Manes

MT. SACI  
Liebert Cassidy Whitmore

## Contracting Out with Certainty: Understanding Professional Experts and Personal Services Contracts

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Presented By:

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## AGENDA

- Professional Experts
- Personal Services Contracts
- Labor Issues
- Independent Contractor Issues
- Temporary Employees and CalPERS

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## Going Outside the Classified Service

Districts can go outside the classified service to  
cover work that is temporary in nature if:

- 1) The Education Code provides a specific exemption
- 2) It would not violate an existing CBA

**Remember: classified employment is the rule  
and temporary employment the exception**

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Professional Experts

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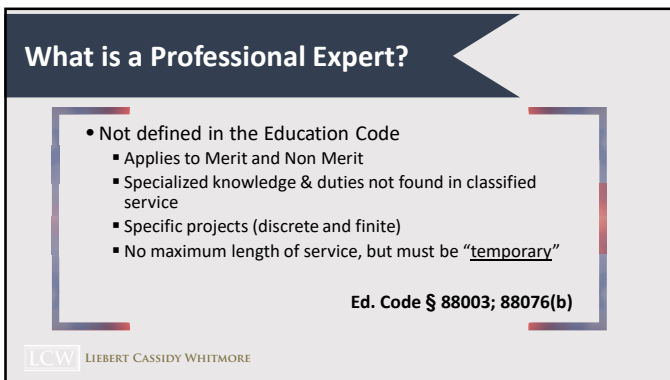
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**What is a Professional Expert?**

- Not defined in the Education Code
  - Applies to Merit and Non Merit
  - Specialized knowledge & duties not found in classified service
  - Specific projects (discrete and finite)
  - No maximum length of service, but must be “temporary”

Ed. Code § 88003; 88076(b)

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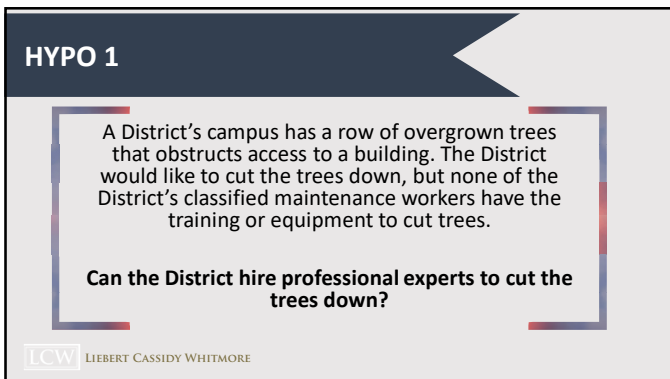
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**HYPO 1**

A District’s campus has a row of overgrown trees that obstructs access to a building. The District would like to cut the trees down, but none of the District’s classified maintenance workers have the training or equipment to cut trees.

**Can the District hire professional experts to cut the trees down?**

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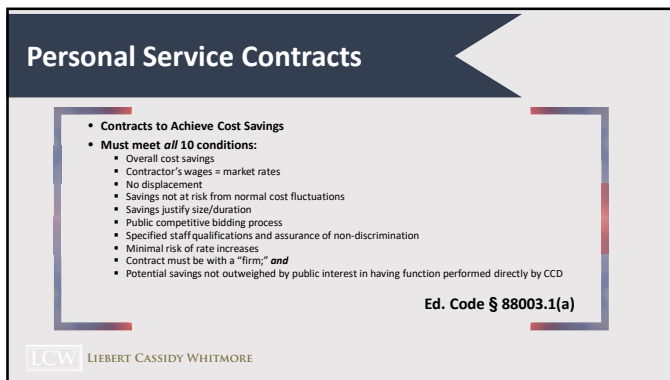
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**Professional Experts vs. Contracting Out**

- Non-Merit Districts **CAN** contract out classified employee work in limited circumstances
- Merit Districts **CANNOT** contract out classified employee work unless the contractor falls under one of the exemptions to the classified service (i.e., professional expert)

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**HYPOTHESIS 2**

A non-merit District needs to re-paint four buildings on campus in one month. The District only has one painter in its classified service, so it needs to hire another painter to get all four jobs done.

**Should the District hire the additional painter as a professional expert or under a contract for personal services?**

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**Labor Issues**

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**Contracting Out Union Work**

**Going outside the classified service requires:**

1. Specific exemption under education code

**And**

2. Employment of temporary (exempt) worker will not violate an existing collective bargaining agreement

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**Personal Service Contracts:  
Contracting Out**

- Subcontracting and Collective Bargaining
  - Must negotiate decision to subcontract
    - If purpose is to reduce labor costs
    - If contract will result in displacement of unit employees
  - Effects of subcontracting must be negotiated
  - No need to bargain if clear waiver or management rights clause

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**HYPO 3A**

During the months of October to December, a non-merit District hosts relay races that draw a large crowd. The District hires workers through a temp agency to help classified employees clean up the stadium after these races. The classified union objects to this practice, arguing that the District is required to use only classified employees for this work and give them overtime. Assume the CBA is silent on the issue.

**Is the union correct?**

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**HYPO 3B**

Same hypo as the last slide, but assume the CBA prohibits the District from contracting out for services that would result in “a layoff or reduction of regular hours or wages of existing bargaining unit members.”

**Now is the union correct that the District may not contract out the stadium cleaning work?**

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**Independent Contractor Issues**



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**Identifying Independent Contractors**

- Professional experts may be employees **OR** independent contractors
- Contractors for personal services may be employees **OR** independent contractors

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**Identifying Independent Contractors**

**The ABC Test (New Test)**

1. Worker is free from the control and direction of District in connection with performance of work (both contractually and actually); **and**
2. Work performed is outside the usual course of the District's business; **and**
3. Worker is customarily engaged in an independently established trade

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**Temporary Employees and CalPERS**

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**Temporary Employees and CalPERS**

- Only employees are eligible for CalPERS membership. Independent contractors are not eligible.
  - "Common law" test applies, not the ABC test.
- Generally regular, part-time employees who work for min. 1 year and at least an average of 20 hrs/wk are CalPERS eligible
- Districts may elect to extend coverage to regular, part-time employees who work less than 1 year for less than an average of 20 hrs/wk

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**CalPERS: Misclassifying Retirees**

- **Risk:** Misclassifying CalPERS retirees as independent contractors
  - Education Code section 88033(c): "No person shall be employed in community college employment while he or she is receiving a retirement allowance under any retirement system by reason of prior school or community college employment. . . ."
  - Exceptions:
    - True independent contractor (common law test)
    - Employment without reinstatement under Government Code sections 7522.56 + 21229 (extra help) or 21221(h) (interim)
      - Applies even if under personal services contract under Education Code section 88003.1

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**CalPERS: Misclassifying Retirees**

- Apply post-retirement work restrictions
  - 960 hour cap (across all agencies)
  - Break in service – 180 days following retirement from CalPERS system (with limited exceptions)
  - No additional benefits
  - Pay no less than minimum nor more than maximum paid to employees performing similar duties
  - No unemployment insurance in prior 12 months
  - Additional restrictions if under normal retirement age
  - Limited term
- Penalties include reinstatement, repayment of retirement benefits, administrative fees

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**CalPERS: Misclassifying Non-Retirees**

- **Risk:** Misclassifying any worker (not just retirees) as an independent contractor:
  - Applies to individuals employed through third party agencies
  - Common law test applies
  - Not enrolled in CalPERS when eligible → penalties
    - Arrears (District pays, member sometimes pays)
    - Administrative fees

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**Thank You!**

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