

Guidelines for Classifying Independent Contractors

An independent contractor is engaged in a distinct profession and is in the business of providing services related to the job being contracted. Independent contractors have total control over the work being performed, generally set their own hours, pay for their own business expenses, and provide their own equipment, liability insurance, and office space.

The basic test for determining whether a worker is an independent contractor or an employee is whether the principal has the right to direct and control the manner and means by which the work is performed. When the principal has the "right of control," the worker will be an employee even if the principal never actually exercises the control. If the principal does not have the right of direction and control, the worker will generally be an independent contractor.

The following guidelines are provided to assist in the distinction between employer/employee vs. independent contractor relationships. These guidelines are based upon criteria used by the Internal Revenue Service, the State Employment Development Division, and other public service agencies.

1. An independent contractor generally is engaged in a distinct occupation or profession, e.g., in the business of providing consulting or other services related to the job being contracted.
2. Independent contractors perform independently; whereas, under an employer/employee relationship the employer retains the right to direct and control the work being performed, as well as control over the details or techniques of the work to be performed.
3. The working area, supplies, and/or equipment generally is not furnished to independent contractors.
4. Compensation for independent contractors is reflective of the specific work accomplished; whereas, employment relationships are generally compensated by payment of a set sum by the hour, week or month based on set hours of work.
5. The work being performed must not be of a type that is integrated into routine or ongoing employer operations.
6. The employer must not make direct payments for business, per diem, or travel expenses incurred by the independent contractor.
7. An employment relationship exists when the worker can quit or be terminated at any time; whereas, an independent contractor is legally obligated for failure to complete the job unless the agreement is terminated.

If, on the face of the relationship, it is not clear whether the principal has the "right of control," there are secondary factors that are considered to determine the existence or nonexistence of the right of control. The Foundation's Independent Contractor Approval Form Addendum includes a series of determination questions that can be utilized as secondary factors to consider.

The courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These relevant facts fall into three main categories: *behavioral control*; *financial control*; and *relationship of the parties*. In each case, it is very important to consider all the facts - no single fact provides the answer. Carefully review the following definitions.

Behavioral Control

These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work.

For example:

- Instructions - if you receive extensive instructions on how work is to be done, this suggests that you are an employee. Instructions can cover a wide range of topics:
 - How, when, and where to do the work
 - What tools or equipment to use
 - What assistants to hire to help with the work
 - Where to purchase supplies and services
- If you receive less extensive instructions about what should be done, but not how it should be done, you may be an independent contractor. For instance, instructions about time and place may be less important than directions on how the work is performed.

Financial Control

These facts show whether there is a right to direct or control the business part of the work.

For Example:

- Significant Investment - if you have a significant investment in your work, you may be an independent contractor. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an independent contractor.
- Expenses - if you are not reimbursed for some or all business expenses, then you may be an independent contractor, especially if your unreimbursed business expenses are high.
- Opportunity for Profit or Loss - if you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an independent contractor.

Relation of the Parties

These are facts that illustrate how the business and the worker perceive their relationship.

For example:

- Employee Benefits - if you receive benefits, such as insurance, pension, or paid leave, this is an indication that you may be an employee. If you do not receive benefits, however, you could be either an employee or an independent contractor.
- Written Contracts - a written contract may show what both you and the business intend. This may be very significant if it is difficult, if not impossible, to determine status based on other facts.

| <u>In this activity</u> | <u>An employee...</u> | <u>An independent contractor...</u> |
|-----------------------------------|---|---|
| Following direction | complies with Foundation instructions about when, where, and how to do the work | determines own direction on when, where, and how to do the work |
| Training | receives training from or at the direction of Foundation | acquires own training independently of Foundation |
| Operational integration | if separated from operation, affects its performance | is separable from the operation without affecting performance |
| Personal involvement | is required to render the services in person | may render services personally or through others |
| Hiring and supervision | hires and supervises Foundation employees | does not hire or supervise Foundation employees |
| Continuity | continues in employ of Foundation | may work sporadically for Foundation |
| Schedule | follows Foundation work schedule | follows own work schedule |
| Full time | works full time for University/Foundation | may work for other employers while at Foundation only part time |
| Facilities | uses University/Foundation facilities for work | has own facilities for the work |
| Work sequence | performs the work in the sequence specified by Foundation | works according to own sequencing of the work |
| Reports | reports progress regularly | reports when work is complete |
| Payment | is paid on a regular periodic basis at set amounts | is paid as work is completed, possible progress payments |
| Business and Travel reimbursement | is reimbursed for travel expenses | pays own travel expenses or may include them in contract |
| Tools and materials | uses Foundation's tools and materials | supplies own tools and materials |
| Investment | has not invested in facilities to perform the services | has invested in own facilities to do the work |
| Business risk | cannot make a profit or suffer a loss from the services | makes a profit or suffers a loss based on services rendered |
| Exclusivity | works only for Foundation | may work for other employers while working for Foundation |
| Publicity | does not offer services to the general public | offers services to the general public as through advertising |
| Dismissal | can be dismissed from employment | cannot be dismissed as long as the work satisfies the contract |
| Performance liability | can quit with no liability for completion of the work | is liable for failure to complete the work. |