

UNIVERSITY *of* HOUSTON
MANUAL OF ADMINISTRATIVE POLICIES AND PROCEDURES

SECTION: Human Resources
AREA: Recruitment and Employment

Number 02.03.02

SUBJECT: Contracting for Services Using Contract Workforce vs. Employment
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I. PURPOSE AND SCOPE

This document provides guidelines to determine whether (1) the relationship with an individual providing services to the university is that of an employee or that of an independent contractor under the U. S. Internal Revenue Code and the laws of the State of Texas and (2) guidelines as to the university's use of contract workforce in retaining independent contractors and temporary workers supplied by approved staffing companies.

II. POLICY STATEMENT

The University of Houston is subject to the Internal Revenue Code and related regulations governing wage withholding and employment taxes and, therefore, governing whether a university worker is hired as an employee or contracted as an independent contractor. Also, the State of Texas provides restrictions related to working relationships with current and former university employees. The appropriate relationship shall be determined in accordance with criteria provided in this MAPP and with Internal Revenue Service (IRS) guidelines before any financial commitment is made.

The individual providing services to the university shall normally be hired through the employment process as an employee unless (i) he or she is clearly eligible for independent contractor status under IRS guidelines and (ii) are able to be effectively used and managed as part of the university's contract workforce.

III. DEFINITIONS

- A. Business organization: For the purposes of this document, an organization operating with an employer identification number and an organizational name.

- B. Conflict of commitment: A situation in which an employee's outside activities interfere with the employee's primary commitment of time and intellectual energies to the university, or in which a full-time employee's primary professional loyalty lies outside the University of Houston.

- C. Conflict of interest: A situation in which there is a divergence between the employee's private interests and professional obligations to the university (i.e., the public interest) such that an independent observer might reasonably question whether the employee's actions or decisions are influenced by considerations of private gain, financial or otherwise, to the university's detriment.
- D. Employee: Any person hired to perform a service for the university who is subject to the will and control of the university in terms of what must be done and how it must be done – regardless of whether the person is staff or faculty, full-time or part-time, temporary or permanent, or holds student status. An employee is hired through the Human Resources Department and paid through the payroll/personnel system, with accompanying federal income and FICA tax withholding, as required by law.
- E. Independent contractor: An individual over whom the university has the right to control or direct the result of the work, but not the means or method of accomplishing the result. The independent contractor is hired on a contract and is paid through the accounts payable system; federal income and FICA taxes are not withheld (except, in some cases, for taxes withheld for foreign national visitors). The amount of the contract must be the gross amount charged to the department's budget. Therefore, if taxes are withheld, the net amount will be the amount of the check.
- F. Individual: For the purposes of this document, a person performing services as an individual under his or her name and social security number
- G. Seven calendar days: For the purposes of this document, any part of seven calendar days within a seminar/work period, regardless of the number of hours taught/worked each day, or whether the days are consecutive or non-consecutive
- H. Temporary: For the purposes of this document, seven calendar days, as defined above

IV. DETERMINING THE APPROPRIATE WORKING RELATIONSHIP

- A. Unless the university relationship with the individual providing the service is extremely short term and involves no right by the university to control the details or means by which the work result is accomplished, the individual shall normally be hired through the personnel/payroll process (as outlined below) as an employee.
- B. When a university department enters into a short-term service relationship and any doubt exists about the appropriateness of contracting with the individual as an

independent contractor, the hiring department shall be responsible for subjecting the relationship to the IRS multiple-factor control test outlined in Addendum B. The Check List for Determining Independent Contractor vs. Employee Classification (Addendum A) is provided for this purpose and should satisfy the requirement in most cases. Since so many variables exist, it cannot be considered an absolute, quantifiable solution to determining every work relationship.

- C. If questions remain about the appropriate relationship, the Human Resources Department should be contacted for guidance.
- D. The college or division business administrator shall review the circumstances and, through the certifying signature, certify that the appropriate working relationship (i.e., employment or contracting) with the individual has been determined.

V. PROVISIONS RELATING TO CURRENT UNIVERSITY EMPLOYEES AND RECENT PAST EMPLOYEES

- A. Under university policy, when an employee of any component of the University of Houston System performs works at the University of Houston under their name and social security number, including work beyond the scope of their regular position, that individual may not be hired as an independent contractor, but must be paid through the personnel/payroll system – regardless of whether the work would otherwise qualify as a contracting relationship.

An employee hired to do work beyond the scope of regular employment (overload) is subject to university additional compensation policies. An employee working at another University of Houston System component is subject to multiple employment (dual employment) policies (Board of Regents Policy 49.04).

- B. Similarly, an individual who has been an employee of any component of the University of Houston System within the past 12 months may not be engaged under their name and social security number on an independent contractor basis, but must be employed and paid through the personnel/payroll system – regardless of whether the work would otherwise qualify as a contracting relationship.
- C. This document provides for the possibility of a current or recent past university employee contracting with the university as an independent contractor through the name and employee identification number of a business. However, under no circumstances may a department contract with an employee through his or her business in the following situations:

1. When the work undertaken under the independent contract is with the employee's university department and within (or was within the past 12 months) the scope of responsibilities of the employee's university position
 2. When the contractual agreement is undertaken to circumvent the limits or the terms of the university additional employment (overload) policies
- D. University employees on full-time appointments are compensated for full-time employment. Work may not be undertaken outside the scope of the responsibilities of an employee's position when such additional work results in a conflict of commitment or a conflict of interest.
- E. It is the responsibility of the employee and of the employing and contracting department to ensure compliance with these provisions.

VI. GENERAL PROVISIONS

- A. As a general rule, eligibility to contract with an individual to provide services to the University of Houston as an independent contractor must be clearly demonstrated under the terms of the multiple factor control test outlined by the IRS. These factors are outlined in Addendum B.

The ultimate judgment is based on the combined weights of each factor; there is no absolute quantifiable result, although more than one-half on either side is a strong indication.

- B. In general, to be eligible for independent contractor status, most of the following factors must apply:
1. The individual controls the method by which the work results are accomplished, as well as the details of the results themselves, without direct supervision by the university.
 2. The individual is financially independent and headquartered in a location physically separate from the university.
 3. The individual offers similar or related services or products to multiple clients.
 4. The relationship with the university is temporary or occasional in nature.
 5. The individual supplies the tools or equipment necessary to perform the job.

6. The individual sets the hours of work. (This factor does not apply in teaching relationships.)
- C. As a general rule, if most of the following factors apply, the individual should be put on the university payroll as an employee:
1. The university has the right to control the method of accomplishing the desired results and the details of the result (even if the control is not exercised); i.e., the work may be supervised and the methods and goals set by the supervisor.
 2. The university has authority to reassign or change the work assignments, and to discipline and terminate the employee.
 3. All or most of the individual's earnings come from the university.
 4. The individual has a continuing relationship with the university.
 5. The university furnishes the tools or equipment necessary to perform the job, as well as the facility.
 6. The university sets the hours and place of work.
- D. As a general rule, when the individual performing the service is not a current or recent past employee of the university, the individual may be treated as an independent contractor when either of the following conditions exist:
1. The individual is a full-time student or is employed full-time by a separate, non-State of Texas organization and the service performed is occasional.
 2. The work being done for the University of Houston is of short duration and/or occasional.

Examples of appropriate contracting relationships under this provision include: professional employees in private business or self-employed who present periodic lectures to university classes or teach short-term non-credit courses or seminars; game officials; and workers in periodic or seasonal sports events.

- E. Service relationships that are unusual and hard to categorize require the approval of the college or division business administrator and the Human Resources Department prior to any commitment between the university and the individual.

VII. PROVISIONS RELATING TO CONTRACT WORKFORCE

In accordance with the State of Texas General Appropriations Act o appropriated funds may be expended for payment of a contract workforce in which the contract is executed, amended, or renewed on or after September 1, 1999, until the university:

- A. Examines the legal and personnel issues relating to use of a contract workforce. All questions relating to legal and personnel issues should be directed to the Office of General Counsel and the Department of Human Resources, respectively;
- B. Conducts a cost benefit analysis prior to hiring contract workers or amending or renewing existing contract workers; and,
- C. Documents why and how the use of contract workers fit into the university's staffing strategies, including consideration of the university's mission, goals and objectives, existing and future employee skills needed, compensation costs, productivity, nature of services to be performed, and workload.

To comply with this section, university departments shall consult the Best Practices and Guidelines for effectively Using Contract Workforce (SAO Report No. 99-326) March, 1999. These practices and guidelines are outlined in Addendum C and also accessible on the web at <http://www.sao.state.tx.us/resources/manuals/workforce/99.326.pdf>.

VIII. THE PERSONNEL/PAYROLL PROCESS

- A. Individuals hired as employees of the university shall be processed through the Human Resources Department. Depending upon the type of position, Human Resources process may include position classification and compensation determination, position posting (when required), application, employment clearance (I-9s, etc.), tax withholding, orientation, etc.
- B. A Personnel Action Request (PAR) form shall be processed through the Human Resources Department and the university System Payroll Department to put the new employee on the university payroll or to activate this assignment, in the case of a current employee. In certain circumstances, a non-recurring PAR may be the appropriate instrument.
- C. When providing compensation to a current university employee for services outside the regular position ("overload"), the university additional compensation policy and procedures shall be followed. The Human Resources Department should be contacted for direction on processing the PAR in such cases.

IX. THE CONTRACTING PROCESS

- A. MAPP 04.04.01 - Contracting outlines the policy required when contracting for individual services as an independent contractor.
- B. In most cases, when contracting for such short-term services as guest lecturer or performer, seminar presentations, or master classes, a standard agreement form (available from Contracts Administration) may be appropriate.
- C. When individual services are contracted through this means, the independent contractor is paid for services through the subsequent submission of a Purchase Voucher. Directions regarding processing Purchase Vouchers can be found in MAPP 4.01.03.

X. REVIEW AND RESPONSIBILITIES:

Responsible Party: Assistant Vice President for Human Resources

Review: Every three years, on or before June 1

XI. APPROVAL

Vice President for Administration and Finance

Senior Vice President for Academic Affairs

President

Date of President's Approval: _____

XII. REFERENCES

U. S. Internal Revenue Code
Treasury Regulations
Applicable Revenue Rulings
Applicable Court Cases
General Provisions of the State of Texas General Appropriations Act

Index Terms: Contracts for personnel
Employee
Employment
Independent contractor

Addendum A

Check List for Determining Independent Contractor vs. Employee Classification

*Start through the questions below, beginning with section I, and stopping as soon as the work relationship is defined.**

I. RELATIONSHIPS WITH CURRENT/PAST UH SYSTEM EMPLOYEES:	<u>YES</u>	<u>NO</u>
A. Does this individual currently work for the UH System as an employee?	Treat as employee	Go to #B
B. During the 12 months prior to the date on which the working relationship is to commence, has this individual worked for the UH System as an employee?	Treat as employee	Go to Sec. II

II. RELATIONSHIPS WITH INDIVIDUALS OUTSIDE UHS EMPLOYMENT: Complete A, B, or C, depending upon the services to be performed by the individual.	<u>YES</u>	<u>NO</u>
A. TEACHER/LECTURER/INSTRUCTOR		
1. Is the individual to perform teaching services of no more than seven calendar days?	Treat as contractor	Go to #A2
2. Does the individual provide the same or similar services to other entities or make them available to the general public as part of a trade or business?	Treat as contractor	Go to #A3
3. In performing instructional duties, will the individual use primarily course materials that are created or selected by the individual?	Treat as contractor	Treat as employee
B. RESEARCHER		
<i>Researchers hired to perform services for a university department are presumed to be university employees. If, however, the researcher collaborates on research with a particular faculty member or employee, the work relationship shall determine whether the individual may be treated as an independent contractor.</i>		
1. Will the individual serve in an advisory or consulting capacity with a faculty/employee; i.e., to work on specific research problems of short-term duration?	Treat as contractor	Go to #B2
2. Will the individual perform research for a university faculty member or employee under an arrangement whereby the faculty/employee serves in a supervisory capacity?	Treat as employee	

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C. INDIVIDUALS IN OTHER POSITIONS

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| 1. Does the individual provide the same or similar services to other entities or the general public as part of a trade or business? | Treat as contractor | Go to #C2 |
| 2. Will the department provide the individual specific instructions regarding performance of the required work, rather than rely on the individual's judgment and expertise? | Treat as employee | Go to #C3 |
| 3. Will the department provide the individual with the tools or equipment necessary to perform the work? | Treat as employee | Go to #C4 |
| 4. Will the university set the number of hours and/or days of the week that the individual is required to work, as opposed to allowing the individual to set his/her own schedule? | Treat as employee | Treat as contractor |

****NOTE: This checklist is designed to provide guidance in most cases, but the evaluation and choice are not quantifiable or absolute.***

Addendum B

INTERNAL REVENUE SERVICE (IRS) GUIDELINES

To help determine whether a worker is an employee or an independent contractor for wage withholding purposes, the IRS has developed a multiple-factor control test based on common law principles; i.e., principles that have evolved in the courts. The factors can be used to help determine what degree of control by the university over the worker is sufficient to establish an employer-employee relationship. The degree of importance of each factor varies depending upon the occupation and the context in which the services are performed. The result is a judgment based on the combined weights of each factor; there is no absolute quantifiable result, although more than one-half on either side is a strong indication. If the relationship is still unclear after applying this test, the individual should be classified as an employee.

The factors on which the relationship should be measured are the following:

- A. Instructions to the worker: If the university has the right to require that the worker comply with instructions about when, where, and how he/she is to perform the assigned work, the worker should ordinarily be an employee.
- B. Training: Providing training to the worker by an experienced employee, by correspondence, by requiring the worker to attend meetings, or by other methods indicates that the university wants the services performed in a particular method or manner; therefore, the worker is being treated as an employee.
- C. Integration of worker's services into university operations: When a worker's services are an integral part of the operations of the department, it generally shows that the worker is subject to the direction and control of the university, and should be, therefore, an employee. An independent contractor's services can usually stand alone and are not integrated into departmental operations.
- D. Requirement that services be rendered personally: If the department requires that the services be rendered personally by the individual, a university interest in the methods used to accomplish the work, as well as in the results, is presumed and, therefore, an employee relationship is suggested.
- E. Hiring, supervising, and paying assistants: If the university has the responsibility and authority to hire, supervise, and pay the worker's assistants, that factor indicates control over the workers and an employee relationship. However, if the worker hires, supervises, and pays the other assistants pursuant to a contract agreement in which he/she is responsible only for the attainment of a result, this factor indicates an independent contractor status.

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- F. Continuity of the relationship: A continuing relationship between the university and the worker indicates an employer-employee relationship, even where work is performed at irregular intervals. An independent contractor has a relationship that ends when the services are completed.
- G. Setting the hours of work: The establishment of set hours of work for the worker by the university is a factor indicating control and, therefore, indicates an employee-employer relationship.
- H. Requirement for full-time work: If the worker is required to devote essentially full time to the university, the university is implicitly restricting the worker from doing other gainful work; therefore, an employee relationship exists. An independent contractor, on the other hand, is free to work when and for whom he/she chooses. (For Internal Revenue purposes, full-time does not necessarily mean eight hours per day or a five- or six-day week.)
- I. Working on the university premises: If the work is performed on the university premises, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off university premises, such as at the worker's office, indicates some freedom from control. However, the importance of the factor in determining the employment relationship depends upon the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.
- J. Setting the order or sequence of work: If the worker is required to perform services in the order or sequence set by the university, that indicates that the worker is not free to follow his/her own pattern of work but is subject to the control of the university. Even if the university does not set the order or sets it infrequently, it is sufficient to show control if the university retains the right to do so.
- K. Requiring regular reports: A requirement that the worker submit regular written or oral reports to the university indicates a degree of control over the employee and is an indication of an employee-employer relationship.
- L. Payment to the worker by hour, week, or month: Payment by the hour, *week*, or month generally points to an employer-employee relationship. An independent contractor is customarily paid by the job or on a commission basis.

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- M. Payment of the worker's business and/or travel expenses: The university's paying of the worker's business and/or travel expenses is ordinarily indicative of an employee-employer relationship. (At the University of Houston, it is acceptable to independently contract with visiting lecturers or collaborators for whom travel expenses are paid, as long as the majority of other factors do not prohibit contracting.)
- N. Furnishing worker's tools and materials: The fact that the university furnishes significant tools, materials, and other equipment tends to indicate the existence of an employee-employer relationship. An individual working as an independent contractor would furnish his/her own tools and materials.
- O. Significant investment in facilities by the worker: If the worker depends upon the university facilities in which to perform the work, this indicates the existence of an employer-employee relationship. If the worker invests in facilities or premises (such as an office or studio) in which to do the work for the university, that factor tends to indicate that the worker is an independent contractor.
- P. Realization of profit or loss by worker: A worker who is not subject to profit or loss as a result of his/her work for the university is in an employment relationship. A worker who can realize a profit or risks suffering a loss as a result of university work is generally in an independent contractor relationship.
- Q. Working for more than one organization at the same time: A worker who works exclusively for the university tends to be in an employee-employer relationship, whereas a worker who performs significant work for multiple unrelated persons or firms at the same time generally indicates that the worker is an independent contractor.
- R. Availability of the worker's services to the general public: The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
- S. University's right to discharge the worker: The right to discipline and to discharge a worker based on behavior and performance is a factor indicating that the worker is an employee and the university is an employer. An independent contractor cannot be fired as long as the contractor produces a result that meets the contract specifications.
- T. Worker's right to terminate the relationship: If the worker has the right to terminate his or her relationship with the university at any time without incurring liability, that indicates an employee-employer relationship; whereas an independent contractor is legally obligated to complete the terms of the contract.

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- U. Provision of employee-type benefits: Provision of paid vacation, sick leave, medical insurance, and retirement benefits is clearly indicative of an employee-employer relationship. The fact that workers' compensation is provided does not indicate an employer-employee relationship where no other employee benefits are provided.

Addendum C

CONTRACT WORKFORCE CHECKLIST

Staffing Strategies Checklist

Have you reviewed the:

1. Overall goals and objectives in the strategic plan?
2. Existing skills of workers compared to those needed in the future?
3. Cost of compensation per position including salaries, benefits, and productivity?
4. Type of work to be performed?
5. Volume of the workload?
6. Time required to complete a project?
7. Cyclical nature of services provided?

Cost-Effective Checklist

Have you:

1. Compared the contract company's charge or the amount paid to contract workers with the salaries and benefits paid to employees doing the same type of work?
2. Compared productivity between the contract workers and state employees?
3. Calculated the unit labor cost per worker? The unit labor cost per worker is the cost of employment adjusted for productivity. For example, if the salary and benefit cost of contract workers is 11 percent less than state employees, and productivity is four percent less, then the unit labor cost of contract workers is still seven percent less than state employees.
4. Factored the cost of training contract workers, such as salaries and lost output? These costs occur because the contract workers are paid while attending training, and they are not continuing to produce output while in training.
5. Analyzed the return on the training investment after the training is over? This analysis can be done by comparing the value of output produced by the contract worker to the money paid for that person's salary and benefits. After training, the output that workers produce should exceed the cost of their salaries and benefits. This gap is how organizations regain training costs.
6. Considered how long the contract worker stays on the job as it relates to training costs?

Addendum C (Page 2)

Best Practices Checklist

1. Provide managers with guidelines for using contract workers. Time limits on assignments should be included prevent “permanent” temporaries.
2. Make distinctions between types of work to be performed by state employees and contract workers. Provide considerations for use in making these distinctions. Avoid using contract workers in critical areas where in-house expertise should be retained or where confidentiality is important.
3. Be specific when describing skills and training needed for the position.
4. Ensure that you are not the only client of independent contractors or contracting companies. Ask them to provide evidence of their independent business operation.
5. Avoid the appearance of an employer-employee relationship by not using the services of one contractor full-time for long periods and by not providing job titles, dedicated office space, or dedicated support staff.
6. Provide separate ID cards for contract workers so they can be identified separately from state employees.
7. Interact with contract workers so that they do not view the State as their employer. For example, contract workers might feel the State is their employer if a supervisor manages and evaluates them the same as state employees.
8. Require any temporary or contracting company to make all employment decisions.
9. Use a separate policy manual and require reporting of personnel problems to the contracting company.

Policies and Procedures Checklist

1. How will you decide whether to use a contract worker or a state employee? A method for analyzing costs and benefits (including productivity) should be included.
2. How will you ensure the best contract workers are fairly and objectively selected?
3. How will you manage the contract workforce? Policies including legal considerations and risks should be included.
4. How will you evaluate and monitor performance of contract workers and contract companies?

The above check lists are only a summary of the issues noted in the *Best Practices and Guidelines for Effectively Using A Contract Workforce.* Please refer to the web site at: <http://www.sap.tx.us/Resources/Manuals/Workforce/99.326.pdf> for a complete copy of the practices and guidelines.