

Classifying Workers as Employees or Independent Contractors

Applicability

This document applies only to persons and sole proprietors. Partnerships, corporations, and other organizations do not need to be classified.

Background

Classifying a worker as an independent contractor rather than as an employee may appear to result in financial savings and less paperwork. However, if the employee is misclassified as an independent contractor, these perceived advantages are offset by the potential penalties that could be assessed by the Internal Revenue Service (IRS) or New York State Department of Labor, by potential Workers' Compensation or unemployment claims, and by liability or malpractice suits.

When to Classify Workers

Operating locations should ensure that workers are properly classified when reviewing application budgets and when hiring an employee or [engaging an independent contractor](#). If at any time an operating location cannot make a determination, the Central Office of Employee Services will provide assistance.

Note: The Research Foundation (RF) is legally obligated to properly classify workers even if a sponsor provides funds for independent contractors in an award.

Employee

In general an employee is subject to the control of the employer as to what work must be done and how the work must be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is enough that the employer has the right to do so.

Under the common law rules cited in IRS rulings, an employee-employer relationship exists when the organization for which services are performed has the right to control and direct the individual who performs the services, not only as to the result accomplished by the work, but also as to the details and means by which the result is accomplished.

An employee is compensated through salary or wage payments and must be appointed to the Research Foundation's payroll.

Independent Contractor

An independent contractor is subject to the control and direction of the organization for which services are performed only as to the result of the work and not as to the means. An independent contractor is compensated based on an established fee and payment is made through the Research Foundation's vendor payment system.

The most frequently used categories of independent contractors:

- [Consultant](#)
- [Lecturer](#)
- [Technical Service](#)

How to Determine the Type of Relationship

In order to determine whether a worker is an employee or an independent contractor operating locations can:

- review the IRS twenty-factor "[Common Law Test](#)" and the [IRS "categories of evidence."](#) or
- request that the IRS predetermine the nature of the work relationship.

Each method is described in the following two blocks.

IRS Common Law Test and "Categories of Evidence"

If locations decide to classify workers without the assistance of the IRS, the twenty-factor "[Common Law Test](#)" and the [IRS "categories of evidence"](#) should be used to guide the determination. All evidence of control and independence must be examined.

The twenty-factors test whether the degree of control exercised by the organization is sufficient to establish an employer-employee relationship. The importance of the factors may vary depending on the services being performed.

The "categories of evidence" are three categories of facts based on the twenty-factor "Common Law Test" that provide evidence of the degree of control and independence in the relationship between the worker and the business.

The IRS developed the categories to assist field agents in determining whether an employer-employee relationship exists, recognizing that the twenty factors and the emphasis given to them may vary according to the occupation and nature of the business. The categories can be applied regardless of the type of service being performed.

IRS Predetermination

The IRS will determine the nature of the work relationship before the relationship is established by reviewing the information provided on [IRS Form SS-8, "Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding"](#) (Exhibit C - Form SS-8).

Operating locations should send all SS-8 forms to the Central Office of Personnel Services, which is responsible for coordinating the review and processing of the form with the Office of the General Counsel and Secretary. Any determination made by the IRS will apply to other workers of the same class if the facts are not materially different from those of the worker whose status was ruled upon.

Documenting the Classification

Operating locations must make each determination on a case-by-case basis and must retain documentation of the circumstances that influenced the determination. If the individual is classified as an independent contractor, the circumstances can be documented on the

Outside Reviews

A review of the employment relationship may be conducted by the IRS or the Department of Labor. The operating location should refer all outside reviews to the Central Office of Personnel Services, which is responsible for discussing the information with the Office of the General Counsel and Secretary before advising the operating location on how to handle the review. The following circumstances may initiate an outside review:

Benefits Claim

The IRS or Department of Labor may review the work relationship if an independent contractor files for:

- unemployment compensation at the end of the contract,
- Workers' Compensation benefits for an injury incurred during performance of the work, or
- disability benefits for a nonwork-related injury or illness.

SS-8 Forms

The IRS will review the work relationship if a contractor files an [SS-8 form](#) (Exhibit C - Form SS-8) requesting an IRS determination of work status. This often occurs when the IRS reviews the contractor's tax records and requests payment of self-employment tax.

IRS or Department of Labor Audit

Agents from the IRS or inspectors from the Department of Labor request information on contractors as part of compliance audits.

Additional Considerations for Classification

While RF policy does not permit a person to be an independent contractor and an employee simultaneously, a former employee may be an independent contractor provided that the work is substantially different from his or her responsibilities as an employee. It should be noted, however, that the IRS is likely to closely review a situation in which a person receives both a W-2 and a 1099-MISC tax statement in the same calendar year.

A SUNY employee may be an independent contractor for the RF, provided that he or she meets the classification criteria.

Penalties for Incorrect Classification

Operating locations are responsible for any loss resulting from misclassification.

Employee Classified as Independent Contractor

There are significant penalties for classifying a worker as an independent contractor when he or she meets the criteria for employee classification. Penalties include liability for employer taxes not paid (for example, FICA or unemployment insurance) and possible liability for employee withholding not remitted, as well as interest, fines, and criminal punishment for noncompliance with tax and immigration statutes.

Independent Contractor Classified as Employee

A worker may always be classified as an employee without penalties. Even if the worker meets the criteria for classification as an independent contractor, an employer may choose to compensate the worker as an employee. However, this increases the restrictions under which the employee works (for example wage and hour laws) and subjects the salary to a fringe benefits charge for Research Foundation benefits.

Correcting Misclassification

The following steps must be taken if an employee is incorrectly classified as an independent contractor:

- Retroactively classify the person as an employee.
- Transfer the independent contractor payments to salary and wages and charge the project, task, award for fringe benefits. The following documents provide additional guidance in other topic areas for engaging an Independent Contractor:

Documents:

- [Guidelines for Vendor or Independent Contract Selection](#)
- [Engaging Independent Contractors](#)
- [NAFTA and Visa Status](#) (applies only to engaging the services of nonresident aliens as independent contractors)

Forms:

- [Nonresident Alien Independent Contractor, Rent Recipient or Royalty Recipient Tax Exemption Certificate](#)
- [Request for Alien Information for Miscellaneous Income Payments](#)
- [Exemption from Withholding on Compensation for Independent \(and Certain Dependent\) Personal Services of a Nonresident Alien Individual Sample Form](#)
- [Independent Contractor Services Form](#)
- [Working Relationship Form](#)

Agreement:

- Independent Contractor Standard Agreement

Change History

- **October 27, 2008** - Updated to add links to documents that provide additional guidance.

Feedback

Was this document clear and easy to follow? Please send your feedback to webfeedback@rfsuny.org.

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