

# **Employee vs. Independent Contractor**

## **I. General**

An employee is an individual who performs a service for Texas Tech University, or related entities, (TTU) and is working under the direction and control of TTU or its employees. Direction and control can be implied to exist when the employer has the right to control both (1) the results and (2) the means and methods of the worker. Payroll taxes are required to be withheld on compensation paid to an employee.

An independent contractor is an individual engaged by TTU to perform a specific function or task and who is free to perform this function or task completely at the individual's own discretion with regard to means and methods. No taxes are required to be withheld on compensation paid to an independent contractor. The existence of an agreement or contract helps support the independent contractor position. This document should be fairly specific in what is to be provided and the amount (or lack thereof) of control TTU has over the individual.

## **II. Factors Distinguishing Employee Status from Independent Contractor Status**

Specific factors that are used by the Internal Revenue Service (IRS) in determining whether an individual is an employee or an independent contractor are listed below. This listing is commonly referred to as the "20 factors" test.

1. Worker is required to comply with instructions about when, where, and how work is done.
2. Worker needs to be trained.
3. Worker's tasks are integrated into normal business operations.
4. Worker's services must be personally rendered.
5. Worker is not responsible for hiring, paying, or supervising assistants.
6. Worker has continuing relationship with "employer".
7. Working hours are set by "employer".
8. Worker is required to devote full-time efforts to "employer's" business.
9. Worker must perform or execute duties on "employer's" premises.
10. Worker's services must conform to order or sequence set by "employer".
11. Worker is required to submit regular oral or written reports.
12. Worker's payment is based on time spent instead of by the job.
13. Worker is reimbursed for travel and other business expenses.
14. Worker is furnished tools, materials, and other equipment by "employer".
15. Worker has no significant investment in facilities (such as an office).
16. Worker has no risk of real economic loss.
17. Worker is not working for more than one "employer" at a time.
18. Worker does not make services available to the general public.
19. Worker is subject to discharge without "employer" penalty -- even if job specifications are met.
20. Worker can terminate relationship with "employer" without worker liability.

### **III. Independent Contractor Questionnaire Procedure**

**A. Independent Contractor Questionnaire Required.** Except as provided in paragraph B below, the Independent Contractor Questionnaire must be completed by all individuals, including businesses operated by an individual as sole proprietorships, that provide services to TTU.

1. *Payments to Individuals*

The questionnaire must be completed and signed by the individual providing services. The account manager should review, sign, and submit the questionnaire with each Check Issuance Request (RI) or Purchase Order (PO) for a payment that is to be made payable to an individual. The questionnaire will be reviewed and signed by Tax Compliance & Reporting prior to processing.

2. *Payments to Sole Proprietorships*

When preparing a Check Issuance Request (RI) or Purchase Order (PO) for a payment that is to be made payable to a business operated as a sole proprietorship, the account manager should check the Independent Contractor Database to determine if a questionnaire is required. A questionnaire will be required by a business operated as a sole proprietorship either (1) annually (based on TTU's fiscal year), or (2) per contract entered into with TTU, as applicable.

If required, the questionnaire must be completed and signed by the business owner. The account manager should review, sign, and submit the questionnaire with the Check Issuance Request (RI) or Purchase Order (PO). The questionnaire will be reviewed and signed by Tax Compliance & Reporting prior to processing. Once approved, the Independent Contractor Database will be updated and the original questionnaire will be forwarded to Purchasing to be kept with the vendor's Form W-9.

**B. Independent Contractor Questionnaire Not Required.** A questionnaire is not required for the following:

1. *Payments for Goods (where no services are provided);*
  2. *Payments to Partnerships (reported to the Partnership's EIN);*
  3. *Payments to Corporations (reported to the Corporation's EIN);*
- and*
4. *Payments to Individuals for Research Participation.*

#### **IV. Certain Individuals Treated As Employees**

**A. Current/Prior Employee.** Any person who is a current employee cannot be paid as an independent contractor. Payment must be made through Payroll and appropriate taxes will be withheld. Any former or retired employee that has been paid by TTU during the past twelve months cannot be paid as an independent contractor with appropriated funds. Payments made with appropriated funds must be made through Payroll and appropriate taxes will be withheld.

**B. Adjunct Faculty and Part-time Instructors.** TAM 9105007 concluded that part-time professors were employees of the college because of the elements of control existing in the relationship between the college and the professors.

**C. Graduate Research Assistants and Fellows.** Teaching/research assistants and graduate assistants (non-teaching) are defined as being assigned to specific duties by a principal investigator or project leader. The employer's legal right to control both the method and the result of the service causes these individuals to be considered employees by definition.

#### **V. IRS Reclassification of an Independent Contractor to Employee Status**

If the IRS reclassifies an independent contractor to employee status, the result may be a substantial financial impact on TTU and the departments that are making the payments. In situations where intentional violations of employment tax rules and regulations are detected (i.e., changing a long-standing employee to an independent contractor in order to "save" payroll taxes and benefit costs), the IRS will assess taxes as follows:

- federal income tax at the rate of 20%; and
- federal social security and Medicare tax assessment of 15.3%.

In some cases, the IRS can levy penalties and interest charges. Even if the taxes have already been paid by the individual in question, the IRS will still make the tax assessment against TTU. It then becomes the responsibility of TTU to obtain repayment from the individual in question (assuming TTU paid the tax assessment).

Additionally, reclassification to employee status may require that the employee be included in pension plans and other fringe benefit programs. The pension plan could be subject to penalty violations or even disqualification.

#### **VI. Additional Resources**

The IRS has an employee versus independent contractor training manual available at their Internet address ([www.irs.gov](http://www.irs.gov)), see [IRS Training Manual](#). This material can be used for training purposes but should not be cited as authority for setting or sustaining a technical position.