

# East Carolina University

## Guide on Employee vs. Independent Contractor

East Carolina University has developed the **Employee / Independent Contractor Determination Checklist** to help department personnel to determine if an individual providing services should be classified as either an independent contractor, or if they should be paid as an employee (temporary or full time).

General Guidelines in Determining an Employee vs. an Independent Contractor:

1. ***Behavioral Control: Does the University have the right to control how the job is done?*** Behavioral control derives from facts that illustrate a right to direct or control how the worker performs their tasks. What is the level of instruction that the business gives the worker? The more defined the instruction, the more likely the worker is properly classified as employee. Considerations include:
  - a. Type of instructions given
  - b. Degree of instruction
  - c. Evaluation systems
  - d. Training
2. ***Financial Control: Does the University have the right to control the economic aspects of the job?*** Financial control derives from facts that illustrate an employer's right to direct or control how the business aspects of the worker's activities (employment) are conducted. Factors include:
  - a. Significant investment
  - b. Unreimbursed expenses
  - c. Opportunity for profit or loss
  - d. Services available to market
  - e. Method of payment
3. ***Type of Relationship: How does the University and the worker see their relationship with one another?*** Types of relationships refer to facts that show how a worker and a business perceive each other's relationship to one another. Considerations include:
  - a. Written contract
  - b. Employee benefits
  - c. Permanency of the relationship
  - d. Regular activity of the business, i.e., University

Special considerations: if the individual providing the services is a former employee of East Carolina University, generally they cannot provide independent contractor services in the same calendar year that they were employed by ECU.

Also, if the services being performed by the individual are similar or the same as the responsibilities of the individual when they were an employee, it is best practice to rehire the individual as a temporary employee.

## IRS TWENTY FACTOR TEST (From IRS Revenue Ruling 87-41)

Generally, there is an employer/employee relationship when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which the result is accomplished. In this connection, it is not necessary that the employer direct or control the way the services are performed; it is sufficient if the employer has the right to do so. The Internal Revenue Service developed the following guide:

### **20 factors to assist the taxpayer in determining if a worker is an Employee or Independent Contractor:**

**"Yes" answer for the following questions most likely indicates that the worker is an employee:**

- 1) Does the business provide instructions to the worker about when, where, and how he or she is to perform the work?** A worker who is required to comply with another person's instructions about when, where, and how they are to work is ordinarily an employee. This control factor is present if the person(s) or business for whom the services are performed have the RIGHT to require compliance with instructions.
- 2) Does the business provide training to the worker?** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
- 3) Are the services provided by the worker integrated into the business' operations?** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
- 4) Must the services be rendered personally by the worker?** If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
- 5) Does the business hire, supervise and pay assistants to the worker?** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.
- 6) Is there a continuing relationship between the business and the worker?** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring, although irregular, intervals.
- 7) Does the business set the work hours and schedule?** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
- 8) Does the worker devote substantially full time to the work of the business?** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.

**9) Is the work performed on the business' premises?** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on 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. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

**10) Is the worker required to perform the services in an order or sequence set by the business?** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently.

**11) Is the worker required to submit oral or written reports to the business?** A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

**12) Is the worker paid by the hour, week, or month?** Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates that the worker is an independent contractor.

**13) Does the business have the right to discharge the worker at will?** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

**14) Can the worker terminate his or her relationship with the business any time he or she wishes without incurring liability to the business?** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time, he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

**15) Does the business pay the traveling expenses of the worker?** If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

**Answering "Yes" for each of the following questions indicates that the worker is likely an Independent Contractor:**

**16) Does the worker furnish significant tools, materials, and equipment?** If the worker furnishes their own tools, materials and equipment, that fact tends to support that the individual is functioning as an independent contractor. The fact that the person(s) or business for whom the services are performed are the same person(s) or business that furnishes significant tools, materials, and other equipment to support work performance tends to show the existence of an employer-employee relationship.

**17) Does the worker have a significant investment in the facilities?** If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.

**18) Can the worker realize a profit or loss because of his or her services?** A worker who can realize a profit or suffer a loss because of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

**19) Does the worker provide services for more than one firm at a time?** If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

**20) Does the worker make his or her services available to the public?** The fact that a worker makes his or her services available to the public on a regular and consistent basis indicates an independent contractor relationship.

# Employee / Independent Contractor Determination Checklist

This checklist helps Materials Management and Accounts Payable determine whether an employer/employee relationship exists for federal, state and FICA tax purposes. The questions below provide information as to the degree of control and the degree of independence in the relationship between the individual performing services and the employer (ECU). Additional information may be requested to make the appropriate determination. The final determination is made by Accounts Payable in conjunction with Human Resources and Materials Management and is based on consideration of all the known facts and not any one answer alone.

## **SECTION 1 – Current Employer – Employee Relationship**

	Yes	No
A. Is the service provider currently employed by ECU?		
B. Is the service provider currently employed by any other State of NC agency? If yes, what agency/department?		
C. Was the individual on the ECU payroll (regular or temporary) during the 12-month period prior to the date these services begin?		
D. Does ECU plan to hire the individual as an employee after the period of his or her services as an independent contractor?		
E. Is the service provider, his/her spouse, registered domestic partner, dependent child or partner an employee or regularly retained agent of ECU?		

## **SECTION 2 – Details of Service – Complete only one part (A, B, or C) depending on the type of services provided.**

<b>Part A - Lecturer/Instructor</b>	Yes	No
1. Is the individual a “Guest Lecturer”, e.g., an individual who lectures less than 10% of the class time?		
2. Is the individual the primary instructor in a department course being offered for academic credit toward a university degree?		
3. Is the individual responsible for the content of the lecture/presentation (versus presenting materials that have been prepared/dictated by the University)?		

<b>Part B – Researcher, individuals engaged to perform research services for a department or sponsored program will generally be treated as employees, unless they are faculty at another research institution or university.</b>	Yes	No
1. Will the individual serve in an advisory or consulting capacity with a University faculty member or director in a “collaboration between equals” type arrangement?		
2. Will the individual perform research in an arrangement whereby an ECU faculty member or director serves in a supervisory capacity?		

<b>Part C - Individuals who are not Instructors/Lecturers or Researchers</b>	<b>Yes</b>	<b>No</b>
1. Does the individual routinely provide the same or similar services outside of ECU to the public as part of a continuing trade or business?		
2. Will the Department provide the individual with specific instructions, supplies, and equipment to perform the required work, rather than rely on the individual's expertise, supplies and equipment?		
3. 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 the work schedule?		
4. Will the University pay the individual an hourly rate similar to what other employees are paid on campus for similar work?		
5. Does the individual engage in entrepreneurial activities in an established business at risk for loss?		
6. Does the individual have his/her own insurance for work-related injuries?		
7. Does the individual provide similar services to other clients?		
8. Are the services performed on campus? If no, indicate the appropriate percentage of time the individual spends on campus, _____%		