Independent Contractors (IC) @ Kent State University

Rationale, Process and Procedures

Presented by:
The Division of Business and Finance
The Office of General Counsel
The Division of Human Resources

November 2013
Agenda

I. Facilitator Introductions

II. Goals/Purpose of the Independent Contractor (IC) Workshop

III. Laws Governing the IC
   A. Purpose
   B. Practice
   C. Impact
   D. Agreements
   E. Questions

IV. Independent Contractor vs. Employee: Tax Perspective
   A. Independent Contractor vs. Employee vs. Entity
   B. IRS Update
   C. Documentation and Support
   D. Tax Tips
   E. Questions

V. New Features to the Independent Contractor Determination Form
   A. Process
   B. Step-by-step
   C. Questions

VI. Accounts Payable
   A. Payments to Independent Contractors
   B. OPERS PEDACKN Form
   C. Questions
I. Facilitator Introductions

- Mr. Michael Pfahl, Associate University Counsel, Office of the General Counsel
- Ms. Paula DiVencenzo, Tax Manager, Business & Finance
- Mr. Alvin Evans, Associate Vice President, Human Resources
- Mrs. Emily Hermon, Manager, Accounts Payable
II. Goals/Purpose of the Independent Contractor (IC) Workshop

- Education and updates about the laws that guide the university’s approach
- Awareness as to the risks associated with IC relationships
- Awareness regarding the tax implications associated with classifications
- Outline of the financial implications for misclassifications
- Understanding of the responsibilities of the online process for IC forms
- Questions and answers
III. Laws Governing the IC

A. Purpose
B. Practice
C. Impact
D. Agreements
E. Questions
A. Purpose

The decision of whether a person is an employee or an independent contractor involves considerations of

• University policy (6-04.3)
• the IRS Code (20-factor test)
• NLRB decisions (National Labor Relations Act Section 2, Part 3.
• Fair Labor Standards Act
• U.S. Court of Appeals for the Sixth Circuit test (common law analysis)
• and other state and federal employment-related regulations.

The University has one opportunity to get the classification right before the relationship begins.

In 2010, Congress took measures to enact the Employee Misclassification Prevention Act (EMPA) which would make misclassification a Federal Labor Law Violation punishable by fines from $1,100 to $5,000 per employee, per violation.

- Since then, Millions upon Millions in fines have been levied...and paid.
- Sullivan University fined -$483,000.00
B. Practice

• **Intent.** The parties' intent is pertinent to the test for independent contractor status. However, such intent is not controlling on the issue of independent contractor status. *(United Ins. Co. of America v. N.L.R.B., 304 F.2d 86 (7th Cir. 1962)).*

• **Common Law Test.** Our federal circuit, the Sixth Circuit uses the “common law” test for determining whether a person is an independent contractor or employee.” the common law analysis requires the consideration of numerous factors, including: 1) the hiring party's right to control the manner and means by which the product is accomplished; 2) the skill required by the hired party; 3) the duration of the relationship between the parties; the hiring party's right to assign additional projects; the hired party's discretion over when and how to work; 4) the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the hiring party's regular business; 5) the hired party's employee benefits; and tax treatment of the hired party's compensation.
20 Common Law Factors (IRS Rev. Ruling 87-41)

1. Instructions
2. Training
3. Integration
4. Services rendered personally
5. Hiring, supervising and paying assistants
6. Continuing relationship
7. Set hours of work
8. Full time required
9. Work done on premises
10. Order or sequence set
11. Oral or written reports
12. Payments by hour, week or month
13. Payment of expenses
14. Furnishing of tools and materials
15. Significant investment
16. Profit or loss
17. Working for more than one firm at a time
18. Making services available to the general public
19. Right to discharge
20. Right to terminate
C. Impact

• Every office is responsible.

• Classification can affect the person’s ability to seek damages against the university for accidents and issues arising during the course of the relationships (worker’s compensation, compensatory damages, etc.)

• **Key consideration:** “Regardless of whether someone is labeled an independent contractor, when the hiring party retains the ‘right to control the manner or means’ by which a particular job is completed, it may be said that the hired party is actually an employee or agent who is acting ‘on behalf of’ the hiring party.” *Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1988), cited in *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp.2d 668 (S.D. Ohio 2009).

• **OPERS.** Change in law allows independent contractors to seek redress if they believe they were misclassified.
D. Agreements

- **Employment Agreements**: Created by the University and available from the Division of Human Resources. Creates an employment relationship.

- **Independent Contractor Agreement**: Should be created in some format by the independent contractor. Should describe “Deliverables” and “Schedules” and should not have any mention of a “salary.” Terms common in creating an independent contractor relationship:
  - Indemnification of university
  - Contractor uses own tools and controls own work
  - Contractor is responsible for all taxes
  - Contractor is not entitled to benefits (leave, health, tuition etc.)
  - University can terminate at any time or with 30 days notice
E. Questions

Michael Pfahl
Associate University Counsel
Office of the General Counsel
Phone: 330-672-2982
E-mail: mpfahl@kent.edu
IV. Tax Perspective

A. Independent Contractor vs. Employee vs. Entity
B. IRS Update
C. Documentation and Support
D. Tax Tips
E. Questions
A. Independent Contractor vs. Employee vs. Entity

Independent Contractor determination required for:
- Individual
- Sole Proprietor
- DBA’s
- Disregarded single member LLC’s
- any payee whose income is reported on Form 1040

Independent Contractor determination not required for:
- Corporations
- Partnerships
- Multimember LLC’s
- Single member LLC’s electing to be treated as a corporation for tax purposes

The use of an employer identification number DOES NOT prove independent contractor

Must ask or Request a W-9

Contract determines who the payee is, not what is on the invoice
B. IRS Update

2011 Memo of understanding- IRS-Dept. of Labor-States “teaming up”

IRS Audit plan – 6,000 audits in 2010, 2011, 2012 – Awaiting results

Self-Audit

3 Control Tests – Behavioral control, financial control, and relationship of the parties

Dual capacity doctrine – Not an employee and an independent contractor in same year
C. Documentation and Support

- Provide WHO – WHAT – WHY – WHERE – HOW
- DO NOT treat independent contractors or contingent workers like employees
- DO NOT USE “salary”, “work”, “compensate”
- USE Contract, payment, fee, service agreement
- Use Guest Speaker instead of teacher – where temporary and where professor is still present – Guest lecturer, expert presentation, etc.
- Acknowledge the intent of the relationship and waive any right to company-sponsored health and retirement benefits in the contract.
- Show responsibilities for an employee differ from those of an independent contractor. A change in classification status should be accompanied by a change in duties and relationship. The amount of control exercised over the work performed is a key factor.
- Agree to paying a fixed fee plus charges for unreimbursed expenses for travel, meals, lodging. Invoice the amounts instead of paying directly or reimbursing separately from the fees for service.
- Do not have the right to determine and do not determine how the work shall be done.
- Show the individual has an on going business with other clients (yellow pages not a resume or VITA).
D. Tax Tips in the IC Approval Process – What are we looking for?

Provide a brief description of the work to be performed.

Be specific

**HELPFUL:** Joe will perform as a soloist on Friday, May 10, 2014 at Spring Commencement Ceremony.

**NOT specific enough:** render services as required under NSF Grant “NIFL Basic Skills”

**Better:** Moderate the Math and Numeracy Discussion list. Includes monitoring all posts, suggests topics for discussion, keeps discussion active, locates experts guest moderators, and reports all activity to project coordinator on a quarterly basis.

Is the work vital? YES = sign of employment

Focus on whether the work is the regular business of the University

Remember that a service can be desirable, necessary, or even essential to a business and still be an independent contractor.

Are they key to the success or continuation of the business?

Faculty are vital.

Guest instructor for a week is not.

Building construction is required but that’s not an educational service.

Musicians for student groups are regular and desired but education can still occur without them.
D. Tax Tips in the IC Approval Process – What are we looking for?

Provide a summary of qualifications of the individual

- This looks at Behavioral Control
- Do not attach a resume or VITAE – looks like an employee
- Highly trained professionals may require less training and instruction and because of a specialized skill, may have other clients.
- Mention other clients and showing the individual is experienced as an independent contractor

- How will the individual be paid?
  - Fixed fee is best. Lump sum when the project is complete.
  - Agree on a payment schedule which typically businesses bill once a month or after meeting targets as stated in the agreement.
  - Equal payments on a weekly, bi-weekly, or bi-monthly basis look like payroll
D. Tax Tips in the IC Approval Process – What are we looking for?

Can the individual terminate the relationship without liability?
Employees usually give a notice and often can leave without finishing projects without being able to be sued.
Contractor agreement should address the consequences if the job is not finished.

Explain why the department believes the individual is an independent contractor.
Provide any other information to support the contractor – USE the control tests.
Avoid “the individual engaged to perform services for the university is not an employee of the of university.”
Explain why the person is not an employee using the 20 factors or 3 control tests
Don’t confuse long term relationship with indefinite.
Long term contracts or contracts renewed regularly due to superior service, competitive costs, or lack of alternate service providers can be IC

How will the individual be reimbursed for travel and/or business expense?
IC – Negotiated cost reimbursements as part of contracted price. Contractor will invoice for service fee plus an amount to cover travel, meals, and lodging.
Direct payment of the business and traveling expenses looks more like an employment relationship.
Avoid answering this questions with “As agreed to per the unsigned agreement”
E. Questions

Paula DiVencenzo
Tax Manager
Tax & Treasury Services
Phone: 330-672-8622
E-mail: pdivence@kent.edu
V. New Features to the Independent Contractor Determination Form

A. Process
B. Step-by-step
C. Questions
A. Process

The Online ICDF is to be used by University departments to submit a request for an Independent Contractor to work at the University. This form gives information to Human Resources to complete a review to be sure that the individual being requested to perform independently contracted work is not a University employee, nor will be performing any duties that a University employee would normally be performing.
A. Process (con’t)

Below is the landing page for the Online ICDF located at https://solutions.kent.edu/IndependentContractor/ or on the HR home page. This page is to give you information on what is needed to complete the ICDF, as well as provide the University’s Independent Contractor Policy. When you are ready to complete the ICDF, click on the “Proceed to Application” link at the bottom right corner of the page.
A. Process (con’t)

We now require a KSU login to complete the form.
A. Process (con’t)

Added to the process is to “Please select the type of provider:” If “Individual, Unincorporated Business (dba), or “Disregarded” SMLLC” is selected then the process will continue. If “Corporation, Partnerships, LLP, Multi-member LLC, and LLC treated as a corporation” is selected then the HR Independent Contractor Determination Form is NOT required.
A. Process (con’t)

Other added features:

1. “Individual’s Date of Birth” – Must be at least 18 years of age

2. Independent Contractor’s email address

3. “Individual’s Resident Status”

4. “Is this individual a relative or business associate of a KSU employee?”
A. Process (con’t)

Other added features:

5. “Where will services be performed? Indicate city, state, and if not within the United States – country”
A. Process (con’t)

Other added features:

6. “What is the expected amount of payment?”

Reminder:

Please upload a draft unsigned written agreement as required by the University Administrative Policy 3342-6-04.3(D)(2 and 3)
B. Step-by-step

1. Gathering data prior to the online submittal
2. Knowing your contractor
3. Submitting BEFORE an IC engagement occurs
4. Getting a signed agreement after HR approval
C. Questions

Alvin Evans
Associate Vice President
Division of Human Resources
Phone: 330-672-8330
E-mail: aevans3@kent.edu

Sandy Taylor
Special Assistant
Division of Human Resources
Phone: 330-672-0771
E-mail: staylor4@kent.edu
VI. Accounts Payable

A. Payments to Independent Contractors

B. OPERS PEDACKN Form

C. Questions
A. Payments to Independent Contractors

Once the services have been rendered, submit the following paperwork to Accounts Payable:

• Completed and signed check request form
• Copy of the HR Independent Contractor Form email
• Copy of fully signed contract (or Independent Contractor Terms of Agreement)
• OPERS PEDACKN form
B. OPERS PEDACKN Form

- PEDACKN – Independent Contractor Acknowledgment Form

- Required under State of Ohio Senate Bill 343 Sec. 145.038, which is a pension reform bill passed in late 2012.

- Must be signed and dated within 30 days of the contractor’s start of service.
C. Questions

Emily Hermon
Manager
Accounts Payable
Phone: 330-672-8649
E-mail: ehermon@kent.edu

Barb Biltz
Accounts Payable Specialist
Accounts Payable
Phone: 330-672-8649
E-mail: bbiltz@kent.edu