

Guidelines for Evaluating and Engaging Independent Contractors at Mercy University

I. Independent Contractors

An independent contractor is a worker contracting with the University to provide services in exchange for compensation. An independent contractor does not work regularly for any single company and is not an employee of Mercy. An independent contractor typically:

- Charges fees for service.
- Is engaged only for the time required to perform an identified service or task.
- Retains control over the method and manner of work.
- Retains economic independence.
- Is responsible for paying their income, Social Security, and Medicare taxes.
- Is not protected by most federal, state, or local laws intended to protect employees.

As an entity contracting with an independent contractor, Mercy generally has the right to control only the end result of the project and not how the independent contractor accomplishes it.

II. Tests for Independent Contractor Status

A. The Fair Labor Standards Act (FLSA) Standard

An individual's specific work circumstances determine their employment status under the FLSA, which involve:

- **The degree of control.** Courts focus on the degree of control the University has over the worker performing the service. In an independent contractor relationship, the contractor controls the work. Mercy controls the result, not how the work is performed. Some examples of control over the manner and means of the work include:
 - establishing the cost of the work to be performed;
 - hiring and firing workers who assist with the project;
 - delegating tasks;
 - having responsibility for licenses, taxes, and other administrative obligations;
 - advertising;
 - preparing work schedules; and
 - working without close supervision or frequent status reports.
- **The relative investment in facilities.**

- **The worker's opportunity for profit and loss.**
- **The permanency of the parties' relationship.**
- **The skill required.**
- **Whether the worker's services are integral to the University's business.**

B. The Department of Labor Test

The Department of Labor (DOL) has traditionally considered the same six factors set forth above to analyze independent contractor status. The DOL also takes the view that a worker's title or label is not relevant to their status as an independent contractor and the following factors are **not** determinative:

- Whether the worker:
 - is paid off the books or receives an IRS Form 1099;
 - agreed verbally or in writing to be classified as an independent contractor, including by signing an independent contractor agreement; or
 - is licensed by a state or local government.
- The place where work is performed.
- The time or mode of pay.

C. The Control Test: The IRS Standard

The Internal Revenue Service (IRS) standard is used to determine whether a worker is an employee for federal tax purposes. Historically, the IRS Standard was the 20-Factor Test, but the IRS has since grouped the 20 factors into three primary categories of the worker's control or independence:

- **Behavioral control.** Behavioral control refers to whether the University controls or has the right to control how the worker does the work. The following are categories of behavioral control factors:
 - the type of instructions given (for example, when and where to do the work, which tools or equipment to use, which workers to hire or use to assist with the work, where to purchase supplies and services, what work must be performed by a particular individual, and the order or sequence to follow when performing the work);
 - the degree of instruction (though the amount of instruction may vary based on the type of work, so the key consideration is whether the company has the right to control the details of a worker's performance);
 - the evaluation system (for example, whether the evaluation system measures the details of the work or the end result); and

- the training needed or given (for example, periodic or on-going training about procedures and methods is “strong evidence” of an employment relationship).
- **Financial control.** Financial control refers to whether the business aspects of the worker’s job are controlled by the company. Categories of financial control factors include whether the worker:
 - has a significant investment in tools, training, office space, and so on;
 - pays their own expenses;
 - has the opportunity to make a profit or sustain a loss on the project;
 - offers their services to the relevant market; and
 - receives payment based on the task and not by the hour, week, or other period of time.
- **The type of relationship.** The type of relationship refers to how the parties perceive their relationship and is generally determined using factors in the following categories:
 - written contracts (a written agreement, however, is not dispositive of the parties’ relationship);
 - employee benefits (for example, if the worker receives benefits like health insurance, pension plan participation, paid vacation, sick days, and disability insurance);
 - permanency of the relationship (for example, if the relationship is expected to continue indefinitely or only for a specific project); and
 - services provided are a key activity of the business (for example, if a law firm hires an attorney).

Mercy must evaluate the entire relationship and consider all of these factors in determining whether a worker is an employee or an independent contractor. No single factor or combination of factors controls. Additionally, factors relevant to one working relationship may not be relevant in another situation.

According to the IRS, the “keys” are to:

- Look at the entire relationship.
- Consider the degree or extent of the right to direct and control.
- Document each of the factors used to make the determination.

Additionally, Mercy (and workers) may request assistance from the IRS to make an employee or independent contractor determination by submitting [Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding](#).

III. Evaluating an Independent Contractor

All tests for independent contractor status are based on a variety of factors and no single factor is dispositive of a worker's classification. Before engaging an independent contractor, Mercy must not only evaluate the contractor's experience and ability to complete the project, but also whether the contractor can satisfy certain indicia of an independent contractor relationship. Mercy must make and keep copies of contractor documents that will support an independent contractor classification if it is later challenged.

A. Operating as a Business Entity

The DOL has historically taken the view that whether the worker has incorporated a business or is licensed by a state or local agency has little influence on the worker's status as an employee or independent contractor (see [DOL Fact Sheet #13](#)). However, Mercy should gather information and documents concerning the worker's business to support an independent contractor classification, including:

- A certificate, license, or other federal, state, or local evidence of the formation or registration of a business entity (including a limited liability company, corporation, partnership, or sole proprietorship).
 - Confirm that the certificate, license, or registration is current and issued to the contractor or their business.
 - Ensure the contractor has not been suspended, debarred, proposed for debarment, declared ineligible, or voluntarily excluded from covered transaction by any Federal department or agency.
- The contractor's federal **Employer Identification Number** (EIN) and its state or local equivalent. Federal EINs are the corporate equivalent of a Social Security number and are issued to every organization by the IRS. State and local governments may issue similar unique numbers to identify the organization for tax and other purposes. (Sole proprietorships generally use the owner's Social Security number.) Companies are responsible for backup withholding for any independent contractor that does not provide an EIN or provides an incorrect EIN.
- Whether the contractor operates their business from their home or another location (for example, rental or lease agreements).
- Whether the contractor has a website or a business phone, fax, or email address.
- Whether the contractor has separate business bank accounts.
- Professional licenses or certificates the contractor or their business holds.

- Insurance the contractor or their business holds in connection with their work, including limits (for example, general liability and workers' compensation insurance).
- Tax documents, including Schedule C, Profit or Loss From a Business. Confirm the contractor has paid federal, state, and local taxes.
- A description of tools, equipment, vehicles, facilities, and other property the contractor owns (or rents) and uses for their work.
- The number of employees the contractor employs (including, for example, copies of the contractor's unemployment insurance information).
- Whether the contractor has previously filed for workers' compensation or unemployment insurance benefits.

B. Advertising Services to the Public

Independent contractors commonly advertise and offer their services to the relevant market as they choose. Working for other clients or customers can demonstrate the contractor's lack of economic dependence on any one company engaging their services. Companies evaluating an independent contractor should collect evidence of the contractor offering their services to other individuals or entities, including:

- Advertising, for example:
 - social media posts and advertising;
 - newspaper, radio, and television advertising;
 - Yelp, Angi, Yellow Pages, or other business directories or listings;
 - a dedicated website; and
 - coupon codes, sales, and other discounts.
- Social media accounts dedicated to the contractor's business, such as Facebook, Twitter, TikTok, Pinterest, LinkedIn, or Instagram pages or accounts.
- Stationery, including letterhead, envelopes, business cards, and novelty advertising items such as key chains, calendars, and pens.
- Requests for payment for work performed for others, including bids, bills, and invoices.
- References, testimonials, and customer reviews.
- Evidence of payment from other customers or clients including an [IRS Form 1099](#), for example.

C. Controlling the Work

Control is a common factor among most tests for independent contractor status. Companies should confirm in advance that the contractor is responsible for:

- Hiring or delegating work to their employees or assistants.
- Setting hours and days of work for themselves and their employees.
- Complying with the required minimum employment standards under federal, state, and local law applicable to their employees, including wage and hour and immigration control requirements.
- Maintaining any licenses, certificates, and permits required for the project.
- Setting the price for services and being paid by the project, not by the hour.
- Owning or renting from a third party the tools, equipment, workspace, and supplies required for the project.
- Controlling how the work is performed. (The company engaging the contractor's services controls only the end product.)

D. Engaging an Independent Contractor

Mercy's obligation to ensure satisfaction of the independent contractor classification requirements continues beyond contractor selection. Throughout a contractor's project or term, the company should:

- Use an independent contractor agreement to establish the terms of the working relationship. Mercy should:
 - avoid using employment applications, employment agreements, and other employee on-boarding documents when engaging independent contractors;
 - regularly review independent contractor agreements and make adjustments when necessary; and
 - prepare a new agreement if an independent contractor is engaged for a new term or project.
- Avoid using former employees as independent contractors or having independent contractors do the same work as employees.
- Avoid using independent contractors to perform work that is integral to the business. For example, a graphic designer generally may be an independent contractor paid to design a shoe company's logo, but not an independent contractor paid to do graphic design work for a graphic design firm.

- Require independent contractors to complete a [Form W-9](#), not [Form W-4](#) used for employees (see [IRS: Forms and Associated Taxes for Independent Contractors](#)).
- Not complete a [Form I-9](#) for independent contractors.
- Not allow independent contractors to manage company employees. Avoid independent contractor participation in the hiring, discipline, or termination of company employees.
- Pay contractors by the project or by an agreed-on flat fee at regular intervals, not by the hour, week, or month. Companies should require contractors to submit invoices and should pay those invoices from accounts payable, not payroll. Companies must issue [IRS Form 1099](#) when payments to an independent contractor satisfy the specified annual threshold.
- Not reimburse independent contractors for business expenses. An independent contractor operates a business and is responsible for expenses. Contractors should factor business expenses such as travel, supplies, and tool rental into the cost of the project. A contractor's ability to manage expenses and set the fee for their services supports a finding that the contractor is economically independent of the company.
- Not provide contractors with employee-type benefits like health insurance, paid vacation, paid holidays, sick leave, and retirement benefits. Require contractors to affirmatively waive their right to those benefits. (Some state and local jurisdictions, however, mandate certain rights and protections for independent contractors that are similar to those typically provided to employees. Companies engaging independent contractors should determine which obligations apply in relevant jurisdictions.)
- Not schedule hours or days of work for contractors or their employees.
- Avoid requiring uniforms, name tags, grooming standards, and similar workplace requirements typically imposed on employees.
- Make ID badges and building access cards for independent contractors different from the ones issued to employees. For example, cards and badges should:
 - be a different color or style;
 - limit access to certain buildings or floors; and
 - be set to deactivate on a specific date.
- Issue separate guidelines for independent contractors, vendors, and other third parties instead of providing them with a copy of the employee handbook. The guidelines may include, for example:
 - entry and exit procedures;
 - parking areas;

- weapons, alcohol, tobacco, and drug-free workplace policies;
 - anti-harassment policies;
 - evacuation and other emergency procedures; and
 - contact information for company personnel responsible for interacting with contractors, vendors, and third parties.
- Limit training (if any) to information about working on the employer's premises, including entry and exit procedures, access to computer systems, and the anti-harassment policies applicable to independent contractors, vendors, and other third parties.
 - Keep independent contractor files with vendor files, not employee files.
 - Not invite contractors to employee-only events or meetings, such as:
 - holiday parties;
 - company retreats;
 - team-building events;
 - town halls; and
 - employee recognition events.
 - Not provide independent contractors with company business cards.
 - Not give independent contractors company job titles.
 - Deal with performance problems as contract modification or breach issues, not as disciplinary issues. Do not conduct performance evaluations for independent contractors. Do not involve Human Resources in the working relationship with independent contractors.
 - Determine if the company's competitors classify similar workers as employees instead of independent contractors.
 - Not assume industry practice satisfies the requirements for independent contractor classification. Entire industries (construction, for example) are often the target of enforcement efforts.
 - Use caution when policies, such as headcount freezes, could result in managers using independent contractors to fill open positions.
 - Regularly audit the company's independent contractor arrangements and template agreements.