

Independent Contractor (IC) Policy

Policy Statement

It is Clark University's policy that an individual who is paid to provide services to the University must be hired as an employee unless the engagement satisfies the three-part Independent Contractor test defined in Section II below.

An Independent Contractor (IC) is generally an individual who is in an independent trade, business, or profession and offers services to the general public. An IC may work as an individual or through a business entity such as a sole proprietorship or limited liability corporation. ICs are sometimes also referred to as consultants, 1099s, contractors, or vendors.

A worker's preference is not relevant to the classification determination, nor is that of the department wishing to engage the individual.

Reason for Policy

Under Massachusetts and federal law, the University is required to meet a number of obligations with respect to the treatment of employees, including wage and hour requirements, payroll tax withholding, and provision of workers compensation and unemployment benefits.

Unlike employees, ICs are not paid through the payroll system, do not receive W-2s, are not enrolled in the University's benefits plans, are not covered by the University's workers compensation program, and are not eligible for unemployment benefits following the contract performance period.

The consequences of misclassifying workers as ICs instead of employees may cause the University to fail to meet its legal obligations and give rise to significant liability, including taxes and related penalties, criminal sanctions, and civil liability. The University has adopted this Policy to guide departments seeking to engage ICs and to establish procedures to ensure that individuals are properly classified as employees unless the strict requirements of the IC test are met.

All proposed IC engagements must be reviewed and approved as set forth in this Policy BEFORE engaging the individual, to ensure proper classification and timely payment.

Who Must Comply

All University departments must comply with this Policy. This Policy applies to any individuals engaged directly to perform any service for the University. This Policy does not apply to the following:

- Vendors with an Employer Identification Number (“EIN”) for tax purposes
- When the University is contracting with a third-party entity (e.g., managed services provider, temp agency, IT staffing firm) to obtain personnel who are classified by those firms as employees or contractors to perform services. However, certain third-party entities are not considered managed service providers and do not go through a formal classification process, but rather act as “freelancer marketplaces” (e.g., TaskRabbit, freelancer.com). This Policy does apply to individuals contracted through freelancer marketplaces, meaning that the procedures set forth below must be followed as part of the engagement.

Responsibilities and Procedures

I. Responsibility for Compliance

When the University is directly employing or contracting with an individual to perform a service, the responsibility for making a correct classification decision rests with the department that is engaging the individual, in consultation with human resources. The department is responsible for any liability resulting from a misclassification decision, including fines, penalties, and attorneys’ fees.

- A. The department seeking to engage the individual is responsible for initiating the procedure described in this Policy. The initial step is to determine whether the Policy applies; that is, is the department contracting with an individual to perform a service. If the Policy applies, all proposed IC engagements must be reviewed and approved consistent with this Policy **BEFORE** a contract is signed or any services are performed. This procedure, including approval and documentation to support a proposed Independent Contractor (IC) classification, is set out in **Section II**.
- B. Human Resources is responsible for reviewing proposed IC engagements to determine whether the worker may be classified as an independent contractor or must be classified as an employee. Unless an exception set forth in **Section IV** applies, Human Resources must review and sign the **Independent Contractor Questionnaire (ICQ)**, as evidence of the classification review process.

Human Resources is also responsible for ensuring that departments are familiar with, and receive adequate training regarding, this Policy and its requirements.

II. Guidance for Classifying Workers

A. Presumption of Employee Status

Under Massachusetts law, every individual receiving payment for services to the University is considered to be an employee of the University unless all of the factors in the following three-part IC test are satisfied. Massachusetts IC law is generally more stringent than the guidance provided by the Internal Revenue Service on IC classification. For this reason, the University will be guided by the Massachusetts law in making classification decisions.

An independent contractor is an individual who – whether working as an individual or doing business through a business entity such as a sole proprietorship, partnership, or limited liability corporation – provides services pursuant to a contract or other agreement.

A worker's preference is not relevant to the classification determination, nor is that of the local department seeking to engage the worker. **Former employees should generally be hired as employees if they are engaged to perform services for the University.**

B. Independent Contractor Test

In order to be classified as an IC, the worker must satisfy all three parts of the following test. Failure to meet one or more of these three parts means that the worker must be hired as an employee.

1. **The worker must be free from the University's control and direction in connection with the performance of the service, both under a contract for the performance of the service and in fact.** In order to be considered an IC, the individual must be able to bring their own approach to the performance of the task. For example, the worker should be free to set their own hours, determine how many hours are needed to perform the work, determine the appropriate tools and methods to use, use their own materials and supplies, set the order in which the services will be performed, and decide where to perform the services. This does not mean that the individual must be free from all direction, but the activities should be carried out with minimal instruction, training, and supervision. The University should have the right only to dictate the desired work product and the deadline for its completion, not the means and methods of accomplishing the result (i.e., where, when, and how the services are performed).

There must be a written contract explicitly stating that the worker has independent control and direction over the work, including the ability to dictate the hours that they will perform the services, and the work should be performed consistent with this statement over the course of the engagement. A purchase order or invoice is not sufficient to satisfy this requirement.

2. **The service performed by the worker must be outside the usual course of the University's business.** Generally, an employer cannot use ICs to perform services within its normal, regular and continuing business operations. The service performed by the individual must be incidental to the operations of the University, rather than a necessary or integrated component of operations. This assessment should consider whether the service is a regular and continuing part of the operations of the department engaging the

worker. If the service is a regular and continuing part of operations, the individual should be hired as an employee rather than engaged as an IC.

In considering whether the services are in the usual course of business, the duration of the engagement is a significant factor. Longer engagements (for example, those that exceed six months in duration) are more likely to fail this prong of the test, because the services performed may be more likely to be part of the regular and continuing operations of the department.

For example, an accounting department needs to engage a painter to repaint its offices. Assuming that the painter meets the other two parts of the test, the individual can be classified as an IC. This is true regardless of whether painters are employed elsewhere at the University. However, if the accounting department needs to bring in an additional accountant to assist during the busy season, that individual could not be classified as an IC even if they met the other two parts of the test, because accounting services are a regular and continuing part of the accounting department's operations.

3. **The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same type as the service being performed.** To be an IC, the worker must be operating an independent business enterprise which offers its services to other clients or customers. The individual must be capable of performing the services for other entities and should not be solely dependent on the University for work. The fact that the person may perform work off-site is not relevant; the test is whether the person is regularly engaged in providing or offering such services for others. It also is not relevant whether the individual would be providing services as an individual or through a corporate entity (e.g., LLC, partnership, or corporation).

Projects that require the worker to devote all or a substantial majority of their working time to the University, thereby precluding work for others as a practical matter, should be limited in duration to ensure that the worker is not in effect working solely for the University over an extended period.

III. Independent Contractor Review and Approval Procedure

Step 1: Initiate a Vendor Request for Individual in Smart Buy Plus

Follow the instructions on this form, and attach required documentation

- W9
- Vendor Information Form
- Draft Contract or scope of services (final contract should not be signed until approved)
- Independent Contractor Questionnaire (**ICQ**) (if necessary) - Unless an exception described in **Section IV** applies, this questionnaire must be completed and attached when submitting the Vendor Request form in Smart Buy Plus.

Step 2: Human Resources Reviews the Independent Contractor Questionnaire

HR will review the ICQ to determine whether the worker should be:

1. Engaged as an IC;
2. Hired as an employee (regular, term, or temporary); or
3. Hired as an employee by an outside entity (such as a temp agency, staffing firm, or payrolling service) and assigned to perform services at the University.

The department must receive HR approval of the classification of a proposed independent contractor before a contract is signed and before any work is performed. If HR classifies the individual as an independent contractor, proceed to Step 3. If not, the department should work with HR to determine the best way to proceed.

Step 3: Department Completes and Signs Contract

If the engagement is approved as a permissible use of an IC, then the department must complete a contract with the IC before any services are provided. Written contracts define the relationship, outline the expectations of both parties, and document the terms and conditions by which the IC is hired. Contracts must be carefully reviewed to ensure terms are reasonable and should include at a minimum, detailed services to be performed, deliverables, contract term, payment amount and schedule, and clause regarding the use of the University's name and ownership of work.

The contract with the IC must contain the language included in the sample IC consulting/services contract. See Appendix B.

Step 4: Create Purchase Order in Smart Buy Plus

When creating the Purchase Order, follow the instructions in Smart Buy Plus and attach a copy of the signed contract.

Step 5: Submit for Payment

At appropriate times as described in the contract (usually after the IC has completed the work to the department's satisfaction), the invoice must be sent to Accounts Payable (apayables@clarku.edu), and the department must complete a receipt in Smart Buy Plus to document that the services have been rendered as agreed.

Payment by AP is the only acceptable method of payment for independent contractors. IC services should not be paid via out-of-pocket reimbursement or by using a Corporate credit or P-Card.

IV. Exceptions to Independent Contractor Questionnaire (ICQ) Requirement

Under the following circumstances, the completion of an ICQ is not required. However, the department must still ensure that the classification satisfies the three-part IC test set forth above, and a written contract is still required.

A. Single, Short-Term Engagements for Less than \$5,000

An Independent Contractor Questionnaire is not required if: (1) the engagement satisfies the three-part IC test set forth above; (2) the engagement will last no longer than three months (90 calendar days); AND (3) total payments to the IC will not exceed \$5,000.

If the department renews, extends, or enters into a subsequent engagement with the IC within a 12-month period, then a completed ICQ is required.

Note: This exception does not apply to current employees of Clark who are providing services to another department

B. Guest Speakers, Lecturers, Facilitators, Panelists or Performing Artists

An ICQ is not required for guest speakers, lecturers, facilitators, panelists or performing artists receiving a payment for their services.

This exception cannot be used for individuals teaching or co-teaching a substantial portion of a course, those listed as instructors in the course catalog, or those who hold a University appointment for their teaching role. These individuals should be classified as employees.

V. Record Retention

Follow the University's Records Retention Schedule regarding record retention. Independent Contractor Questionnaires should be retained as long as the contracts are retained.

Responsibilities and Contacts

Human Resources is responsible for maintaining this Policy and acting as a resource for questions regarding this Policy. It is also responsible for reviewing IC classification decisions, seeking guidance on difficult classification questions, and providing training resources regarding this Policy.

Department considering engaging an individual to perform services is responsible for initiating the procedures described in this Policy. Departments must either secure proper review and approval of an IC engagement or confirm that an exception to the ICQ requirement applies, before a contract is signed or any services are performed.

Requestor in Smart Buy Plus is responsible for ensuring that required documentation that supports the IC classification decision has been completed before a vendor is created in the Accounts Payable system or any payment is issued. Required documentation includes a signed contract, an approved ICQ (if required), and an invoice.

Revision History

March 2021

Policy Implemented
