FAS Guidelines for Determining Independent Contractor Status

1. Overview

From time to time, work needs may require the retention of an Independent Contractor ("IC") to provide services that are outside of the scope of FAS' usual business of teaching and research. We have developed these Guidelines to help you navigate through the process of retaining an IC in a way that complies with Massachusetts and Federal laws and applicable Harvard policies.

An IC is an individual who contracts to do work for another business entity according to the individual’s own processes and methods. An IC is not subject to the entity’s control over his or her work except for what is specified in a mutually binding agreement for a specific piece of work. This working relationship is flexible and can be beneficial to both the IC and FAS. However, the decision to classify someone as an IC should be weighed carefully since consequences for misclassification are costly.

2. IC or Employee

IC determinations are based upon Massachusetts laws and Federal Internal Revenue Service (IRS) Regulations. These laws and regulations provide the framework through which FAS can legally hire individuals as ICs, without providing benefits or other services that would normally be associated with an employee. ICs maintain control over the work process and have a greater flexibility over when and how the work is performed.

3. How to Determine Eligibility for IC Status

There are two tests that must be met in order to determine IC status:

- The Massachusetts Test for IC Status (attached) and
- The Internal Revenue Service (IRS) 23-Factor Test (attached)

NOTE: You must satisfy both of these tests before you can move to the IRS 23-Factor IC Questionnaire.

It is important to meet the requirements of these tests prior to engaging the services of any potential IC and prior to including IC roles in any grants.
4. Working With Your HR Consultant

Your HR Consultant is a valuable partner to you when you are considering options in this regard and you should contact your HR Consultant as soon as you become aware of the need for work to be performed in the context of a grant application or otherwise.

5. Working With Your IC Liaison

Currently, your IC Liaison is Andrea Kelton-Harris. Working closely with your HR Consultant, your IC Liaison provides oversight to the IC process and is a direct resource to help guide you through this process. From time to time FAS HR may also consult with the Office of Labor & Employee Relations (LER) and/or the Office of the General Counsel.

6. Massachusetts and IRS Tests for IC Determinations

These tests are precursors to completing the IRS 23-Factor IC Questionnaire. Based on both the Massachusetts law and the IRS statutes, the tests consists of six questions, all six of which must be satisfied or the individual is not eligible to be considered further for IC status. Once the Massachusetts and IRS Tests have been satisfied, you may move ahead with completing the IRS 23-Factor IC Questionnaire.

7. Why Proper Classification Is Necessary

Proper classification of an IC ensures that FAS is in compliance with various federal laws, state and local laws and regulations. Granting this status should not be taken lightly since there are significant tax penalties for incorrect classification of an individual as an IC.

8. Consequences for Misclassifications

Penalties for violation include treble (triple) damages awarded on:

- The value of the contract, plus benefits that would have otherwise been paid
- Payroll and other taxes
- Interest
• Attorney’s fees
• Potential additional civil penalties

No showing of a willful or knowing violation is necessary – treble damages are automatic. For example, on a $50,000 contract, the settlement amount can be $150,000 plus three times the fringe rate. Given this, it is in essential that each request is fully documented.

9. Out of State Requests

Requests for work to be done outside of Massachusetts present different challenges and risks. If you plan to engage someone outside of Massachusetts, you should understand that Harvard is not registered as an employer in every state. If the individual is not eligible for IC status, options to engage the individual may be limited. Every situation will be unique so please be sure to allow enough time for proper determination.

10. International Requests

Requests for work to be done outside of the United States present a difficult and still more complex set of challenges and risks. If you plan to engage someone outside of the United States, you should understand that each situation will be unique as the country in which the work will be performed has their own set of labor laws. When considering an IC who will perform the work outside of the United States, please be sure to allow additional time to work with the available resources to reach a proper determination.