Massachusetts and IRS Tests for Independent Contractor Determinations

Prior to committing to any potential Independent Contractor (“IC”) and prior to including any IC role in a grant, please take the following tests. The first set of three questions, which constitute the test found in Massachusetts law (the “Massachusetts test”), must be answered in the affirmative before moving forward to complete the second set of three questions which constitute the IRS test and must be answered in the negative. If the circumstances of your request allow you to answer the questions in this way, you may then move ahead and complete the IRS 23-Factor IC Questionnaire.

Massachusetts Test

1A. Is there Freedom from Control? Yes _____ No _____

According to Massachusetts law, an individual must be “free from control and direction in connection with the performance of the service, both under his contract for the performance of the service and in fact.” In other words, the individual must be free to carry out his or her duties with minimal instruction from Harvard. For example, according to a memorandum prepared by the Massachusetts Attorney General, an individual that qualifies as an independent contractor “completes the job using his or her own approach with little direction and dictates the hours that he or she will work on the job.”

In practice, there must be a written document (a contract) stating the scope of the individual's work. However, the document itself is not enough to make a worker an IC. An individual must perform his or her functions independently. ICs perform their work using an approach of their own choosing. They can determine when and where they work, and how much work is needed to perform the project for which they have been retained. In contrast, employees are subject to more control. For example, an employer determines the work methods and schedules of employees.

2A. Is the Service Outside of the Usual Course of FAS’ Business? Yes _____ No _____

ICs must provide services and/or perform functions which are outside the FAS’ work unit’s usual course of business. Harvard is generally engaged in the course of teaching and research. Accordingly, we cannot engage ICs to perform work in these areas, and should classify such individuals as employees or engage their services through some other alternative, such as through a vendor relationship with a third-party employer or another institution.

Most requests that fail will fail on this question. At FAS, most of the services that we provide are in the realm of teaching and research. For example, if the FAS
retains an individual to provide services as a Teaching Tutor or as a Researcher, that person could be characterized as an employee under Massachusetts law. Both of these functions fall within the normal course of our business.

3A. Is the Prospective Contractor Engaged in an Independent Trade, Occupation, Profession or Business?  Yes _____  No _____

An IC must hold him or herself out to the public as available to provide the same or similar services to a variety of employers. A true IC has a financial investment in his/her contracting/consulting business. Other factors to consider include incorporation status of the individual, existence of a business website, business licensing, etc.

IF YOU ANSWERED YES TO THE THREE QUESTIONS ABOVE, PLEASE MOVE ON TO THE THREE QUESTIONS BELOW.

IRS Test

1B. Was this worker previously treated as an employee?  Yes _____  No _____

If Yes, is the worker performing services in a substantially similar capacity and under substantially similar direction and control?  Yes _____  No _____

If Yes, the individual may not be classified as an IC.
Options for alternative classifications are LHT, Term or temporary appointments. Please work with your HR Consultant to determine the appropriate status.

If No, please proceed to question 2B.

2B. Is the worker a Harvard student?  Yes _____  No _____

If Yes, the individual may not be classified as an IC.
Options for alternative classifications are LHT, Term or temporary appointments. Please work with your HR Consultant to determine the appropriate status.

3B. Are co-workers performing substantially similar services and under substantially similar direction and control, treated as employees?  Yes _____  No _____

If Yes, the individual may not be classified as an IC.
Options for alternative classifications are LHT, Term or temporary appointments. Please work with your HR Consultant to determine the appropriate status. An Employment Type Chart is attached.

If No, please proceed to the IRS 23-Factor IC Questionnaire.