

## Factors and Process

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### 1. Who are independent contractors?

Independent contractors are self-employed individuals in an independent trade, business, or profession who offer their services to the general public under a contract or agreement. Typically, independent contractors supply their own workplace and tools, are not supervised, control their work schedule, and have a particular set of skills not found elsewhere within the University. These individuals are not eligible for employee benefits and are not covered under the University's workers compensation program.

### 2. What is the difference between an employee and an independent contractor?

It is critical that Brown correctly determines whether the individual providing services is an employee or an independent contractor. A consultant would not typically perform a department's core work ex. Teaching, research assistant.

Generally, employers must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. Employers generally do not have to withhold or pay any taxes on payments to independent contractors.

### 3. Which type of services require a professional service agreement (PSA)?

Professional and consulting services are usually customized services that utilize specialized intellectual or creative expertise based on personal skills or ideas of an individual (s) or company that are provided for a fee, which may be determined individually with each customer for each service contract.

### 4. Which types of services do not require a professional service agreement?

Routine services provided to a large number of customers, usually at published rates, and without significant customization, do not require a professional service agreement. Examples of routine services include translation services, indexing, trade and/or repair services.

### 5. Can an individual waive their right to be considered an employee and opt to be a contractor?

No, a worker cannot waive their employee status through a contract, or otherwise. Specific criteria must be met to classify a worker as an independent contractor; otherwise, the worker is an employee, no matter what a contract or waiver says.

### 6. How does Brown determine if a worker is an employee or an independent contractor?

Brown relies on departments to develop a description of the work to be performed and to complete the *Employee Versus Independent Contractor Checklist* to assess the appropriate classification. The *Employee Versus Independent Contractor Checklist* is based on the IRS Common Law Test, described below. This checklist must be completed before the provision of services begins to ensure correct classification. The form identifies when a "yes" response either strengthens or weakens the case that the individual is an independent contractor. This determination is central to the question of how an individual should be paid for services provided to the University.

### 7. What is the IRS Common Law Test?

The [Common Law Test](#) outlines and defines 20 factors that are used to help determine whether the person providing the service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered. The 20 factors are broken down into three categories: behavioral control, financial control and the type of relationship between the business and the worker.

## Frequently Asked Questions: Determination of Employee Versus Independent Contractor

### **8. How is behavioral control defined?**

Behavior control refers to whether the employer has the right to direct or control the work being done, including the amount and type of direction given, the amount of hours worked, the recurring work schedule, and the type of training provided. A worker is an employee when the business has the right to direct and control the worker.

### **9. How is financial control defined?**

Financial control refers to who controls the economic aspects of the worker's job, such as how the business pays the worker and the extent to which the worker has unreimbursed business expenses. When compared to employees, independent contractors are more likely to:

- be paid a flat fee or on a "time and materials" basis,
- have unreimbursed business expenses,
- make significant investments in tools and facilities,
- make their services available to other businesses, and realize a profit or loss.

### **10. How does the type of relationship between an independent contractor and a business differ from the relationship between an employee and employer?**

There are several questions to consider when determining how the worker and the business perceive their relationship:

- Is there is a written contract describing the relationship?
- What is the extent to which the worker is available to perform services for other businesses?
- How permanent is the relationship?
- What is the extent to which services performed by the worker are a key aspect of the business?
- Is the worker entitled to employee-type benefits?

### **11. Are the factors weighed differently when determining whether a worker is an employee or an independent contractor?**

No. Under the IRS Common Law Test, there is no "magic" or set number of criteria that must be met, and no one factor stands alone in making the determination. Some factors may indicate that the worker is an employee, while other factors indicate the worker is an independent contractor. An employer must weigh all factors when determining whether an individual is an employee or an independent contractor. The general rule is that an individual is an independent contractor if the payor (the University) has the right to control or direct only the result of the work, not what will be done and how it will be done. The more control the business has over the individual, the more likely that individual will be classified as an employee and not an independent contractor.

### **12. What are the penalties for misclassifying employees as independent contractors?**

Federal and state enforcement agencies have made worker misclassification a top priority, and the consequences for misclassification can be significant. In addition to owing back pay, overtime, and benefits to a misclassified worker, the employer may be ordered to pay back taxes, interest, and fines. The employee may also be ordered to pay back taxes, fines, and interest.

### **13. Can current faculty, staff, or students be independent contractors?**

Individuals currently or formerly (within the calendar year) employed by the University may not provide services to the University as an External Service Provider.

## Frequently Asked Questions: Determination of Employee Versus Independent Contractor

If the service being provided is the same as or similar to that of a current employee, the individual (External Service Provider) must be paid as an employee and not, as an independent contractor. Exceptions to this provision are to be reviewed and approved (if allowable) during the contract review process

### **14. Does the determination of employee versus independent contractor apply to grant funded professional services?**

Yes, the same factors and process is required regardless of funding source.

### **15. What are the reasons to hire someone as an employee?**

- Background checks are completed
- Sensitive information and data protected against viruses or outside threats
- Access to Brown's systems
- Brown email provided

### **16. Can a former employee be an independent contractor?**

In most cases, a former employee cannot be hired as an independent contractor for a service similar to the work performed during their employment, especially if the work is performed in the same calendar year. If the work to be completed is different, the former employee can be hired as an independent contractor only if they are not receiving wages from Brown. These situations should be carefully evaluated to ensure proper classification as the individual will receive both a 1099 and W2 in the same calendar year which will be reported to the IRS.

### **17. Are background checks conducted for independent contractors?**

No, independent contractors are not subject to background checks. However, all Brown and nextSource employees require background checks.

### **18. What if I am unsure of the appropriate classification after completing the checklist, or I need assistance with completing the checklist?**

Departments should work closely with their respective HR Business Partner, UHR - Compensation Services, or Strategic Purchasing, Contracts & Insurance to assist with the assessment.

## Employee Status Determined

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### **19. Once the *Employee Versus Independent Contractor Checklist* has been completed and it has been determined that the individual should be an employee, what are the next steps?**

Approval of an increase in staffing requires the approval of the Senior Officer, Human Resources Business Partner and University Human Resources. All staff hires require that budgeted salary and benefit funds be identified prior to finalizing the hire. Once approval is obtained and funding identified, you should consult with your Human Resources Business Partner to determine the appropriate hiring process. It may be appropriate to hire the individual as a Seasonal/Intermittent employee of through nextSource, Brown's partner for temporary employment needs. Information on Temporary Employment can be found [here](#).

### **20. Are there location restrictions with hiring someone as an Intermittent/ Seasonal Employee?**

Yes, only individuals in RI, MA, NY, and CA can be hired as seasonal/ intermittent employees, if outside of these states, please refer to nextSource.

## Frequently Asked Questions: Determination of Employee Versus Independent Contractor

### **21. What if I classify someone as an employee, but the individual is outside of United States?**

nextSource has the capabilities of hiring individuals outside of the United States; the only requirement would be that the individual has a U.S. bank account and U.S. address.

### **22. If there is an agreement in place, can the individual transition to an employee?**

If the prior Professional Services Agreement template was used (version revised 3/2013), then the individual should remain an independent contractor until the end of the period of performance before transitioning to an employee. However, if the department and the individual agree in writing to the new classification, he or she can transition to a temporary employee prior to the termination date.

## Independent Contractor Status Determined

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### **23. Once the *Employee Versus Independent Contractor Checklist* has been completed and it has been determined that that the individual should be an independent contractor, what are the next steps?**

Once the independent contractor classification has been determined, both parties should sign an agreement requested through the Brown Contract Management(BCM) system . The University's standard *Professional Services Agreement* (PSA) form can be used. If the standard PSA is not used, Strategic Purchasing, Contracts and Insurance or the Office of the General Counsel must review and approve the terms of the contract. A detailed scope of work and fees should be determined at this time. Any contract or agreement outside of the standard PSA must be signed by a Brown employee who has signatory authority. PSAs over \$25,000 require that the University's [competitive bid process](#) be followed.

Once the contract has been reviewed and approved, the independent contractor must complete the *Supplier Registration Form* to be added as a supplier in the database. The department must then create a requisition in Workday that includes a copy of the contract and the *Employee Versus Independent Contractor Checklist*. Once these steps have been completed, a purchase order will be issued to the supplier and work may begin.

### **24. How long can an independent contractor work for a department?**

While there is no specific limit, a continuing relationship between the business and worker is considered an indication of an employer/employee relationship. Since the relationship can change over time if contracts are renewed or extended, be sure to review the checklist to determine whether the worker still qualifies as an independent contractor.

### **25. Can I hire an independent contractor to perform work outside of the U.S?**

It depends. SPCI will work with UHR and the OGC to review the facts and confirm the classification. If deemed to be a contractor, please note that U.S. Citizens and Permanent residents performing services overseas may be subject to taxation in the United States and in the country where the services are being performed. It is strongly recommend that U.S. persons consult with their tax adviser to determine the personal tax impact. Foreign National individuals performing services outside of the United States are generally not taxed in the United States, as this would be considered foreign sourced income. Please contact the tax department at [controller\\_payroll@brown.edu](mailto:controller_payroll@brown.edu) for questions related to Foreign National individuals performing services outside of the United States. More information on payments to foreign nationals can be found [here](#).