

ADMINISTRATIVE PROCEDURES



Procedure Number: 22-10

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C. P. Dubel
County Administrator

SUBJECT: **EMPLOYEE VERSUS INDEPENDENT CONTRACTOR**

DEPARTMENT RESPONSIBLE: **Finance and Risk Management**

1. **PURPOSE**

This procedure addresses the manner by which Pima County will determine whether an individual being considered to perform services for the County shall be treated as an employee or as an independent contractor.

Contract Attorneys hired by the Office of Court Appointed Counsel for indigent defense representation are exempt from this procedure.

2. **BACKGROUND**

Pima County must withhold and/or pay federal income, social security, and Medicare taxes on wages; pay workers' compensation and unemployment insurance on wages; and allow access to benefits such as minimum wage, overtime pay and family and medical leave to individuals considered employees by the Department of Labor or the Internal Revenue Service.

Failure to withhold or pay applicable payroll taxes and insurance, and to provide access to benefits, subjects the County to pay those taxes and insurance, along with penalties and interest, to the Internal Revenue Service, Department of Labor, and the effected individual.

The determination of whether an individual is an employee or an independent contractor for payroll tax and benefits purposes depends on the specific facts of the working arrangement with the individual. These factors focus on the economic realities of the arrangement. The following factors are to be considered in making such a determination (each factor is explained further in the procedure).

- 1) The extent to which the work performed is an integral part of the employer's business.
- 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss.
- 3) The relative investments in facilities and equipment by the worker and the employer.
- 4) The worker's skill and initiative.
- 5) The permanency of the worker's relationship with the employer.

6) The nature and degree of control by the employer.

There is no single test or checklist that will determine whether a worker is an employee or an independent contractor. The individual factors must be considered in their totality when making that determination.

3. **FACTOR DEFINITIONS**

Integration: The extent to which the work performed is an integral part of the employer's business.

If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

Managerial: Whether the worker's managerial skills affect his or her opportunity for profit and loss.

Managerial skills may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills, and if so, whether those skills affect that worker's opportunity for both profit and loss.

Investment: The relative investments in facilities and equipment by the worker and the employer.

The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing a risk of loss, the worker may be an independent contractor.

Initiative: The worker's skill and initiative.

Employees and independent contractors may both be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that would suggest an independent contractor status.

Permanency: The permanency of the worker's relationship with the employer.

Permanency or indefiniteness in the worker's relationship with the employer suggest that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

Control: The nature and degree of control by the employer.

Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status, because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

NOTE: There are certain factors which are immaterial in determining the employee relationship:

1. The fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship and not the label given to the relationship is determinative.
2. The fact that the worker has incorporated a business has little bearing on determining the existence of an employment relationship.

4. PROCEDURE

A. Making the Employee or Independent Contractor Determination prior to Procurement Performing a Solicitation Process

1. Prior to requesting that Procurement perform a solicitation process for services typically provided by a sole proprietor, departments shall complete questions 1-21 of the Pima County [Employee Versus Independent Contractor Determination Questionnaire](#), located on the Finance and Risk Management intranet, Forms tab, Accounts Payable sub-tab.
2. Departments shall submit the partially completed questionnaire containing only the responses to questions 1-21, along with a copy of the proposed solicitation's scope of services, to the Financial Operations Division Manager in the Department of Finance and Risk Management.

3. The Financial Operations Division Manager will review the documentation and determine whether the scope qualifies as an independent contractor or employee.
 - a. If the scope is determined to be eligible as an independent contractor, the Financial Operations Division Manager will provide the department with written approval through email to proceed with the solicitation. The email will include attachments of the reviewed scope and corresponding questionnaire which is to be forwarded to Procurement by the department.
 - b. If the scope is determined to not be eligible as an independent contractor, the Financial Operations Division Manager will explain the reasons for the determination to the submitting department. If those reasons cannot be resolved by the submitting department, the Financial Operations Division Manager will reject the solicitation scope in writing. The department will not request the Procurement Department to perform a solicitation. The department may then choose to hire the individual as an employee.

B. Making the Employee or Independent Contractor Determination

1. A contract cannot be processed until it is determined whether an individual is an employee or an independent contractor. To make this determination, a department shall complete the Pima County [Employee Versus Independent Contractor Determination Questionnaire](#), located on the Finance and Risk Management intranet, Forms tab, Accounts Payable sub-tab, when a contract for services is requested or a solicitation response is received.
2. The completed questionnaire, together with a copy of the proposed contract for services, and a Worker's Compensation Sole Proprietor Waiver, if applicable, shall be submitted to the Financial Operations Division Manager in the Department of Finance and Risk Management.
3. Finance will review the submitted documentation and make a determination of whether the worker is an independent contractor or an employee.
 - a. If the individual is determined to be an independent contractor, the contract will be approved for further processing by the submitting department and by the Procurement Department.
 - b. If the individual is determined to be an employee rather than an independent contractor, the Financial Operations Division Manager will explain the reasons for the determination to the submitting department. If those reasons cannot be resolved by the submitting department the contract cannot be processed. The department may then choose to hire the individual as an employee.

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- c. If approved as an Independent Contractor and applicable, the Financial Operations Division Manager will provide the completed Worker's Compensation Sole Proprietor Waiver to Risk Management. Risk Management will return the entire completed packet to the requesting department.

C. Responsible Departments

1. A department requesting a contract for the services of an individual shall complete the appropriate forms.
2. The Department of Finance and Risk Management shall review the forms and make a determination of the status of the individual as either an employee or an independent contractor.
3. The Procurement Department shall refer departments requesting a contract for services of an individual to this administrative procedure.