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I.  INTRODUCTION

The purpose of this APL is to provide assistance to University of Maine System personnel in identifying the appropriate classification for individuals who provide a service (Independent Contractors). These guidelines do not apply to contracts with corporations under which professional services may be provided. The Internal Revenue Service has set forth certain conditions that must be considered in determining if an individual is an Independent Contractor or employee. When an individual does not meet the conditions of an Independent Contractor, the IRS says an employee/employer relationship exists and they must be paid through payroll. An employer who does not treat an individual as an employee, when required, is subject to penalties for failure to withhold taxes and to pay social security taxes on that employee (e.g., up to 40% of FICA taxes). Additionally, the State of Maine, via Public Law 2011, Chapter 643 125th Legislature, 2nd Regular Session, has further defined Independent Contractor for purposes of Maine unemployment law and workers’ compensation law and includes a minimum set of criteria that must be met. (See Section II- Determination of Independent Contractor Status Checklist)

This APL explains the conditions established by the IRS and by Maine Statute. It outlines the methods of payment to be used in these situations and addresses questions often asked by UMS personnel regarding Independent Contractors. Campuses will be responsible for implementing the guidelines and making determinations about the proper payment method and will be responsible for monitoring payments made to individuals through the accounting system to assure consistent application of the guidelines.

The material in this APL is intended to be only a guide. It is not to be viewed as a comprehensive treatment of all University policy in relation to Independent Contractors. Questions should be directed to your Campus Human Resources Office.

II.  EMPLOYEE OR INDEPENDENT CONTRACTOR-DEFINITION, DETERMINATION CHECKLIST, AND FACTORS

One of the most frequent questions arising under the employment tax laws is whether an individual worker should be treated as an “employee” or an “Independent Contractor” for payroll tax purposes.

Independent Contractors are considered self-employed persons (individuals) who provide a service not readily available within the University System. They are responsible for making their own tax payments and the University has no tax withholding or tax payment obligations with respect to compensation paid to an Independent Contractor.

Independent Contractor: Individual doing business under Social Security Number (SSN) - Use University of Maine System Personal Service Contract attached to this APL.

A. DEFINED

Under IRS regulations, the primary method used to determine whether an employee-employer relationship exists is the Common Law test. The central focus of the Common Law test is determining who has the right to control two basic elements: (1) what must be done, and (2) how it must be done. Under this test, a worker is considered an employee subject to payroll tax withholding if the employer has the right to control both the result to be accomplished and the method or means by which the result is achieved. If the employer has the right to control or direct only the result of the work and not the means used to accomplish the result, the individual generally qualifies as an Independent Contractor.

The Common Law test can be difficult to apply to specific cases or situations. Proper application of the test requires an employer to consider a number of factors or characteristics of the work in question to determine whether an employee-employer relationship exists. For example, two characteristics typically indicating that an individual has “employee status” are: (1) the employer has the right to discharge the worker, and (2) the employer supplies the worker with tools and a place to work. On the other hand, individuals who offer their services to the general public in the pursuit of an independent trade, business or profession normally are not considered employees. Keep in mind, however, that no one factor or set of factors is automatically controlling. All the facts and circumstances of a particular situation must be taken into account in determining whether an individual worker should be treated as an employee or as an Independent Contractor.

Under Maine Statute, a minimum set of criteria must be met for a person to qualify as an Independent Contractor; primary criteria must be met and three out of seven secondary criteria must also be met (page 4, Determination of Independent Contractor Status Checklist). All factors used on the checklist overlap with IRS language.
DETERMINATION OF INDEPENDENT CONTRACTOR STATUS CHECKLIST

Although Maine law is not identical to Internal Revenue Service regulations, complying with the more stringent State law should result in meeting both State and Federal standards. Maine law requires that an individual meet all five primary criteria (A through E below) and at least three secondary criteria (F through L below) to qualify as an Independent Contractor. Use the following checklist to determine if an individual meets the test for Independent Contractor status. If the person does not meet all five primary criteria and at least three of the seven secondary criteria, an employee/employer relationship exists and the person must be paid through payroll. (Attach this form to the Requisition)

### MAINE LAW CRITERIA

All five of the following must be YES to qualify for Independent Contractor status:

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Does the individual have the essential right to control the means and progress of the work except as to final results?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(B) Is the individual customarily engaged in an independently established trade, occupation, profession or business?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(C) Does the individual have the opportunity for profit and loss as a result of the services being performed?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(D) Does the individual hire and pay the individual's assistants, if any, and, supervise the details of the assistants' work?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(E) Does the individual make their services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
</tbody>
</table>

At least three of the following must be YES to qualify for Independent Contractor status:

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>(F) Does the individual have a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(G) Is the individual free to work for others and not exclusively for the University of Maine System?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(H) Is the individual responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(I) Do the parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(J) Is payment to the individual based on factors directly related to the work performed and not solely on the amount of time expended by the individual?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(K) Is the work outside the University’s usual course of business for which the service is performed?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
<tr>
<td>(L) Has the individual been deemed to be an Independent Contractor by the IRS?</td>
<td>[ ]</td>
<td>[ ]</td>
</tr>
</tbody>
</table>
B. FACTORS USED BY THE IRS

In determining the status of a worker, the IRS has a number of work factors or characteristics that it takes into account in deciding whether an employer’s control over an individual is sufficient to establish an employer-employee relationship. None of the factors, standing alone, is necessarily controlling or decisive. Rather, the IRS stresses, “All information that provides evidence of the degree of control and the degree of independence must be considered”.

Factors that provide evidence of the degree of control and independence fall into three categories:

1. Behavioral Control - Factors that show whether the University has a right to direct and control how the worker does the task for which the worker is hired.

2. Financial Control - Factors that show whether the University has a right to control the business aspects of the worker’s job.

3. The Type of Relationship of the Parties - Factors that show the parties’ type of relationship.

Additional information is available on the IRS website regarding Common Law Rules.

An employer may allow the individual considerable discretion and freedom in deciding how to perform or carry out the job; however, the decisive factor is that the employer possesses the legal right to control or direct both the results and the method of the work or services in question. As long as the employer is entitled to control both what must be done and how it gets done the individual worker is NOT an Independent Contractor.

If it is determined there is an Independent Contractor relationship (i.e., not an employee), a University of Maine System Personal Service Contract must be completed, signed and kept on file.

Note: Reference APL VII-A.2, UMS Purchasing Procedures and APL IV-C, Signature Authority to ensure appropriate University of Maine System purchasing procedures and signature authority guidelines are followed.

III: MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

The work factors used by the IRS are not, however, the last word in determining worker status. There are hundreds of court cases and rulings that further complicate this difficult question.

An employer who classifies an employee as an Independent Contractor, with no reasonable basis for doing so, may be held liable for employment taxes for that worker.

On the other hand, Section 530 of the 1978 Revenue Act may provide some measure of protection (i.e., “safe harbor”) to the employer that has treated certain classes of workers as Independent Contractors on a consistent basis since 1978. To be covered under this “safe harbor” provision, an employer must meet the following conditions:

1. The employer must have consistently issued Form 1099 to the Individual.

2. The employer must NOT have treated workers who do basically the same type of work as employees after 1977.

3. The employer has a “reasonable basis” for treating this particular individual as an Independent Contractor. The “reasonable basis” can be met by having relied on court cases and rulings or by IRS audits that did not result in the worker being reclassified as an employee or long-standing, recognized industry practice.
Even with the safety net provided in Section 530, relief is not available for any year and for any workers for whom The University did not file the required information returns. Employers can face trouble from the IRS in other employment-related areas such as retirement plans. It should be noted that the IRS takes the position that arguing for safe harbor relief from payroll taxes is an admission by the employer that a worker is an employee under the Common Law Test.

IV. GUIDELINES FOR CONTRACTING SERVICES FROM INDIVIDUALS

The University of Maine System Personal Service Contract, or other UMS Approved Contract or Agreement, is applicable to individuals only and is not to be used in the following circumstances:

1. Contracts with businesses, corporations, partnerships, or LLC’s.
2. Part-time faculty who teach credit courses or develop course work.
3. Individuals who do not qualify as Independent Contractors and may be employees.

The following guidelines will be used throughout the University of Maine System in contracting services from individuals. These guidelines should be reviewed and adhered to when entering into a contractual agreement with individuals who are NOT to be considered employees of the University, but who perform services for the University specific to the terms of a contractual agreement. Contact your campus Human Resources Department to inquire about specific guidelines that may pertain to your campus.

1. An Independent Contractor is defined as an individual over whom the University would have the right to control or direct ONLY the result of the work performed. The University would not have the right to control or direct the methods or means of accomplishing the result of the work.

2. The Maine Law criteria shall be used in determining the status of individuals who perform services for the University of Maine System. If employee status is determined to be appropriate, the existing mechanisms for recruitment, search, hiring and payment of wages that are used for regular or temporary employees are to be used. If Independent Contractor status is determined to be appropriate, Contractor selection and payment will be in accordance with APL VII-A.2, UMS Purchasing Procedures and Accounts Payable procedures specific to personal service contracts. (For Maine Law Criteria see Section II-Determination of Independent Contractor Status Checklist)

3. Individuals who provide services to the University of Maine System will comply with policies and procedures established by the Board of Trustees as well as those established by this document. The campus, department, program or college that enters into a contractual agreement shall be responsible for ensuring compliance by both the University and the Contractor with the terms of the agreement. When in doubt, the campus, college, department or program shall also be responsible for working with appropriate University personnel to determine whether an individual is to be considered an employee or Independent Contractor.

4. When the University enters into a contractual agreement with an individual for the performance of a service the UNIVERSITY OF MAINE SYSTEM PERSONAL SERVICE CONTRACT, or other University Approved Contract/Agreement, must be completed. Prior to entering into an agreement for the services of an Independent Contractor, the University official signing the Contract should review the guidelines outlined in this APL.
5. A contract may not be used to acquire the services of an individual who is to teach credit courses or develop course work. Such an individual must be treated as an employee of the University and may also be subject to terms of a collective bargaining agreement.

6. First time contractors must complete a New Supplier Request form so a supplier record can be created in MaineStreet Marketplace. To obtain complete instructions for processing contracts please contact your Campus Purchasing Department.

7. When a contract is completed, the campus should issue a “Purchase Order” (PO) in MaineStreet Marketplace for identification and control purposes. The Determination of Independent Contractor Status Checklist should be attached. The contract becomes valid only after a purchase order is created. The PO number should appear on invoices related to the contract.

Under a University of Maine System Personal Service Contract, or other UMS Approved Contract, payments for services made to an Independent Contractor will result in the University issuing a 1099-Misc form. An Independent Contractor is NOT eligible for any University provided benefits or programs.

V. EXAMPLES

Example 1: Independent Contractor

The University’s department of Chemical Engineering expanded their degree program and needed a computerized database program to manage the student records. The department contracted the services of John James, a local self-employed computer programmer.

Mr. James has his own office, uses his own equipment, offers his services to the general public and overall controls the details and the results of his work. Mr. James is considered an Independent Contractor and must complete a University of Maine System Personal Services Contract with the Department of Chemical Engineering.

Prior to services being performed, a purchase requisition should be submitted by the Chemical Engineering Department via MaineStreet Marketplace. Mr. James will be paid through the accounts payable system upon receipt of an invoice to the University.

Example 2: Can a worker be an Employee and an Independent Contractor

A) A University System employee works as a faculty member in the College of Arts and Sciences. Outside of his role as a University employee he acts as a freelance photographer. On occasion he is asked by the University to photograph special events. Whereas the freelance photography work is not included within his job description as a University faculty member and he provides this service to the general public, he is an Independent Contractor when performing freelance photography work for the University.

B) The University Press needed editorial services to meet a publication deadline and used the services of Amy Snow, an Administrative Specialist in the Library. Ms. Snow offered to work for the press on Saturdays and evenings and obtained the permission of her supervisor at the Library.

Ms. Snow will be paid through the University Payroll System because she does not meet the conditions required under Maine Law Criteria to be considered an Independent Contractor.

The University Press must pay Ms. Snow at her overtime rate and use an additional compensation form to authorize payment from University Press funds to Ms. Snow.
Example 3: Payment to an organization, company, partnership, or LLC

The University needs a website designer to design a standard set of protocols for University of Maine System websites and secures the services of Ms. Ford, a well known webmaster. Ms. Ford is co-founder of “Etiquette in Web Design” and payments are to be made to her company under her Employer Identification Number. Ms. Ford is not an Independent Contractor; this should be treated as a Contract for Services between the University and Etiquette in Web Design. (See APL VII-A.2, UMS Purchasing Procedures)

Example 4: Honoraria Payments

The University is hosting an employee appreciation day and has invited several (non-employee) guest speakers to attend. These individuals do not promote themselves as speakers but would like to participate in the event. No verbal or written contracts exist between the University and these individuals and no expectation of monetary compensation will be paid for their participation. As a way to “thank” these individuals for attending the event the University issues an honorarium payment for an amount suitable to the University. These individuals are not considered Independent Contractors however IRS reporting rules do apply.

References: Portions of this document have been taken from the following resources:
- Journal of Accountancy, May 1991
- Bureau of National Affairs, Payroll Administration Guide
- State of Maine Public Law 643 125th Legislature, 2nd Regular Session

Related Documents:
- APL IV-C, Signature Authority
- APL VII-A.2, UMS Purchasing Procedures

University of Maine System Policy Manual – Board of Trustees
- Section 206 Board of Trustees – Ethics Code and Conflict of Interest
- Section 207 Signatory Authorities
- Section 410 Employee Conflict of Interest

This Administrative Practice Letter has been approved by the Treasurer of the University of Maine System.