**Determining Contract Labor and UPPS No. 04.04.08**

**Independent Contractor Status Issue No. 5**

**Effective Date: 07/18/2022**

**Next Review Date: 08/01/2026 (E4Y)**

**Sr. Reviewer: Associate Vice President for Finances Services**

**POLICY STATEMENT**

*Texas State University is committed to properly assigning relationships between contractors and the university to ensure compliance with common law principles.*

**01. DEFINING AN INDEPENDENT CONTRACTOR**

01.01 The Texas Workforce Commission (TWC) presumes that anyone who provides services for Texas State University is an employee until the university proves that it has no right to exercise direction or control over the work performed.

01.02 The Internal Revenue Service (IRS) applies an 11-factor test when determining whether a person is an employee of the university or an independent contractor. While none of these factors are independently controlling, a prevailing number of factors would possibly lead the IRS to believe that person is an employee. The following factors must be considered by the university to determine whether an individual is an employee or independent contractor:

a. the instructions the university gives the worker;

b. the training the university gives the worker;

c. the extent to which the worker has unreimbursed business expenses;

d. the extent of the worker’s investment;

e. the extent to which the worker makes services available to the relevant market;

f. how the university pays the worker;

g. the extent to which the worker can realize a profit or loss;

h. written contracts describing the relationship the parties intended to create;

i. whether or not the university provides the worker with employee-type benefits such as insurance, pension plan, vacation pay, or sick pay;

j. the permanency of the relationship; and

k. the extent to which services performed by the worker are a key aspect of the regular business of the university.

01.03 The above 11 factors correspond to the following three categories established by the IRS:

a. Behavioral control is the first consideration. A worker is an employee if the university has the right to direct and control how the work is performed or provides training and supervision to the worker.

b. Financial control occurs when the university has the right to control the business aspects of the worker’s job, such as reimbursement of expenses, providing tools and workspace, or other support.

c. Relationship of the parties is the third consideration. Factors such as employee benefits would indicate an employee and employer relationship. If the worker does not offer services to the public, or if the university’s operation depends on the worker to perform standard tasks, this would also indicate an employee and employer relationship. A written contract that establishes an independent contractor status is beneficial if it is difficult to determine the status based on other factors.

**02. LEGAL CONSIDERATIONS**

02.01 The university, through the application of the 11 factors listed in Section 01.02, has the responsibility of determining whether or not a person is an employee or independent contractor.

02.02 The TWC conducts audits of employer accounts to ensure compliance with the [Texas Unemployment Compensation Act](https://statutes.capitol.texas.gov/Docs/LA/htm/LA.201.htm). The TWC has the statutory authority and legal obligation to determine whether individuals are employees or independent contractors and to assess back taxes, penalties, and interest as required.

02.03 The Department of Labor (DOL) has the authority to determine whether individuals who are determined by the university to be employees are subject to the overtime provisions of the [Wages and the Fair Labor Standards Act](https://www.dol.gov/agencies/whd/flsa) and to grant back pay as required.

02.04 The IRS has the authority to audit the university’s determination of whether individuals are employees or independent contractors. Under [IRC 6651](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MLI_06_FailureFilePenalty.pdf), the IRS can assess penalties and interests for failure to file or pay taxes.

02.05 The TWC, DOL, or IRS can perform unannounced audits to determine compliance with employee or contract labor requirements. Any penalty, interest, tax assessment, or backpay resulting from a noncompliance finding will be paid by the initiating department.

**03. CONTRACT AND PAYMENT PROCEDURES**

03.01 Account managers should realize that simply classifying a worker as an independent contractor does not make it so. All aspects of the actual working relationship will be used to determine if the university has the right to exercise direction and control.

03.02 During the contract negotiation process, and before a new vendor can be set up, the account manager must ask the proposed contractor to complete [Form FS-06, Employee vs. Independent Contractor Determination](https://www.txstate.edu/procurement/forms.html), provided on the [Procurement and Strategic Sourcing website](https://www.txst.edu/procurement/). The account manager must sign the form and send it to the director of Procurement and Strategic Sourcing for review and approval. The director of Procurement and Strategic Sourcing will assist the account manager in making the correct determination of worker classification. The director of Procurement and Strategic Sourcing will keep [Form FS-06](https://www.txstate.edu/procurement/forms.html) on file if the worker is classified as an independent contractor.

03.03 If the payee is classified as an independent contractor, the payee will receive payment according to procedures found in [UPPS No. 03.04.01](http://www.txstate.edu/effective/upps/upps-03-04-01.html), Contracted Services, Including Consultants, Speakers, and Other Services.

03.04 If the payee is classified as a university employee, the payee will receive payment according to procedures in [UPPS No. 04.04.03](https://policies.txst.edu/university-policies/04-04-03.html), Staff Employment, [AA/PPS No. 04.01.01](https://policies.txst.edu/division-policies/academic-affairs/04-01-01.html), Faculty Hiring, or [AA/PPS No. 04.01.02](https://policies.txst.edu/division-policies/academic-affairs/04-01-02.html), Hiring and Employment of Temporary, Non-Continuing Faculty.

**04. REVIEWERS OF THIS UPPS**

04.01 Reviewers of this UPPS include the following:

Position Date

Associate Vice President for August 1 E4Y

Financial Services

Director, Procurement and August 1 E4Y

Strategic Sourcing

Assistant Vice President for August 1 E4Y

Human Resources

Director, Payroll and Tax Compliance August 1 E4Y

**05. CERTIFICATION STATEMENT**

This UPPS has been approved by the following individuals in their official capacities and represents Texas State policy and procedure from the date of this document until superseded.

Associate Vice President for Financial Services; senior reviewer of this UPPS

Vice President for Finance and Support Services

President