



## **Determining Employee or Contractor Status Q&A**

Q.1 What is an employee?

Q.2 What is a contractor?

Q.3. Why does the University need to determine if a person is an employee or a contractor?

Q.4 What penalties apply for breaches?

Q.5 What facts need to be considered when determining if a person is an employee or contractor?

Q.6 What procedures need to be undertaken when determining if a person is an employee or contractor?

Q.7 Who can engage an employee or contractor?

Q.8 How do I find out further information about determining if a person is to be engaged as an employee or contractor?

### **Q.1 What is an employee?**

**A.1** An employee is generally a person who undertakes activities/tasks as part of her or his “*contract of service with an employer*”. An employee works under a contract of service to provide her or his labour to enable the employer to achieve a result. Primarily ACU National engages individuals as employees.

### **Q.2 What is a contractor?**

**A.2** A contractor is generally a person who is employed by a company which undertakes activities/tasks as part of a “*contract for service*”. An independent contractor will enter into a fee for service contract to achieve a particular specified result. The possession of an Australian Business Number (ABN) is not sufficient in itself to determine an independent contractor status. The nature of the actual work and working relationship will also have a bearing when determining the contractor status.

### **Q3. Why does the University need to determine if a person is an employee or a contractor?**

**A.3** ACU regularly engages people and companies to provide a range of services. In some circumstances, there may be some confusion as to whether the arrangement should be one of employer/employee or whether the person(s) may be engaged as a contractor. ACU must determine correctly if a person is an employee or contractor in order to abide by a range of relevant state and federal legislation. These include, taxation, workers’ compensation, superannuation, payroll tax and employment and industrial law. There are significant penalties imposed on organisations and individuals that breach the legislation; particularly if a company tries to avoid its obligations as an employer by creating a “sham” contractual arrangement through which obligations to an actual employee are avoided.

### **Q.4 What penalties apply for breaches?**

**A.4** Penalties will vary subject to the relevant piece of legislation that has been breached. Penalties can be significant in terms of potential costs, and depending on the legislation, an individual manager may also be liable for breaching the law along with the University. It should also be noted that depending on the arrangements made, a person may be considered to be an independent contractor for taxation purposes, and yet deemed to be an employee for superannuation or workers’ compensation purposes. The Federal *Workplace Relations Act* also has provision for the Federal Court to review the terms of any fee for service contract in order to ensure that the contract is not “unfair”.

### **Q.5 What facts need to be considered when determining if a person is an employee or contractor?**

**A.5** ACU National has a detailed policy “*Determining Employee/Contractor Status*” to help nominated supervisors determine if a person should be engaged as an employee or contractor. The policy is available on the Human Resources website. However, there are general rules nominated supervisors can apply to help them make this decision. For example:

- Who has the right to exercise overall control of the way that the task is performed?
- Has a company been engaged or an individual been hired to perform the task?
- If the worker is unavailable (i.e. through illness), is a replacement provided? If so, who provides the replacement? If the company provides a replacement, this is usually an indication that a fee for service contract applies.
- What level of freedom of action and degree of autonomy is given to the person to undertake the task?
- Who has the authority to hire or fire the person?
- Has the individual person the right to delegate the function and if so under what authority?

- What is the basis and the manner of payment? Is the person to be paid via the payroll (which means that they are an employee) or is the company to be paid via invoice through the accounts payable system (which means there would be a fee for service contractual arrangement in place).
- Who provides the materials, consumables and equipment needed to do the work?
- Are there regular or defined hours of work or is there an explicit timetable with milestones to be met at defined dates as specified in a contract?
- Is there a regular place of work provided at the employer's premises?
- Who bears the risks and exposure, i.e. who takes out the workers' compensation and public liability insurance?
- Was a position of 'employee' advertised or was there a tender issued with specifications for the provision of a service?

The University policy "*Determining Employee/Contractor Status Policy*" in its attachments 1, 2 and 3 also provides nominated supervisors with further guidelines and a detailed checklist to assist them in determining if a person is an employee or contractor. This policy is available on the Human Resources website.

**Q.6 What procedures need to be undertaken when determining if a person is an employee or contractor?**

**A.6** Attachment 1, 2 and 3 of the University policy "*Determining Employee/Contractor Status*" outlines procedures to assist a nominated supervisor in determining if engagement is to be as an employee or contractor. The standard University appointment or tender processes should be followed in conjunction with the procedures outlined in attachments 1,2 and 3.

- **Attachment 1** of the policy sets out a discussion of the concept of common law employee.
- **Attachment 2** of the policy sets out the steps that need to be followed and provides guidance on how to complete the checklist contained in attachment 3.
- **Attachment 3** of the policy contains the checklist. The nominated supervisor establishes the status (employee or contractor) using the checklist outlined in attachment 3. The completed checklist and other relevant documentation should be forwarded to the relevant Executive Staff member for consideration and approval (approval by the Executive Staff member is subject to the level of appointment, nature of employment (fixed term/continuing), or in the case of engagement of an independent contractor the funding required) the nominated supervisor should refer to the relevant staffing delegations for guidance in terms of approval required, this is also outlined in Q.7).

**Q.7 Who can engage an employee or contractor?**

**A.7** The University's Staffing Delegations and the corresponding Financial Delegations specify which categories of staff have the delegation to act as an authorising officer for the purpose of entering into a fee for service contract with an external contractor. Heads of Schools and Managers are also referred to the Financial Delegations which specify the levels of authority necessary to authorise the expenditure of University funds. Heads of Schools and Managers/Directors are advised that expenditure on a fee for service contract must not be split into several smaller contracts each involving a smaller amount of University expenditure.

**Q.8 How do I find out further information about determining if a person is to be engaged as an employee or contractor?**

**A.8** You can refer to the Human Resources Directorate and Financial Directorate websites for policy/guideline information, discuss the policy with your supervisor, or contact your local Human Resources Consultant.