

Name of Guidelines	Determining Employee/Contractor Status Guidelines	
Description of Guidelines	<p>These Guidelines are designed to assist managers in correctly determining whether an individual should be engaged as an employee or as a contractor to ensure the University meets its legal obligations. The Guidelines also outline the processes for engagement and documentation that is required.</p>	
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Guidelines for Determining the Nature of the Relationship

The University engages a variety of individuals and entities to provide a range of services and perform a variety of tasks including administration, teaching, research and other business related activities. Depending upon whether the individual or entity is categorised as an employee or contractor, the University may have legal obligations which relate to superannuation, workers compensation insurance, payroll tax and industrial, equal opportunity and workplace health and safety legislation. It is important that ACU establishes the correct legal relationship with the individuals and entities it engages to ensure it complies with relevant applicable legislation and minimises its exposure to penalties. Identifying and then ensuring these obligations are met is the responsibility of ACU.

This guide is intended to assist in deciding whether an individual should be engaged as an employee or as a contractor. That decision will then determine the process for engagement and the appropriate documentation that is required.

1 Assessing the nature of the relationship

The relationship between an employer and an employee is a contractual one. It is referred to as a **contract of service**. This is contrasted with the relationship of principal and independent contractor (otherwise referred to as consultant), which is a **contract for services**. The difference is essentially that an independent contractor/consultant contracts to achieve a result, whereas an employee contracts to provide their labour to enable the employer to achieve a result.

Generally, an employee of an organisation bears little exposure to risk of the costs or commercial losses. An employee is not likely to expend gross income or contribute assets in deriving the income. In examining the risk to determine the independence of the contract, the higher the degree to which a person is exposed to a commercial loss, the more likely they are to be regarded as an independent contractor.

1.1 Factors in determining an employee or a contractor relationship

The common law test for determining whether a relationship is one of employment or independent contract involves identifying and assessing various features of the relationship to determine, on an objective assessment, the nature of the relationship.

While the various features have been identified, and acknowledged by the courts, as indicators of the nature of the relationship, individual features are only a guide. It is necessary in each case to examine all the terms of the arrangement to determine whether, on balance, the relationship is that of an employee or an independent contractor.

The following factors will assist in qualifying a relationship. The relevant factors outlined below may be dependent upon or impacted by the contract of employment (in the case of employees) or the contract for services (in the case of contractors).

Factors to Consider	Employee	Contractor
Control over Work	The University has an implied right in industrial law to direct and control the work of an employee including how, when and where the work is performed. The employee works in the business of the employer and the University, as the employer, is free to manage its business as it sees fit.	The University has a right to specify how the contracted services are to be performed in the terms of the contract. Otherwise the contractor is free to exercise their own discretion.
Independence	An employee performs work for the University in accordance with an employment contract.	A contractor performs services as specified in a contract with the University and provides additional services only by agreement.

Payment	An employee is generally paid for their time on an hourly, weekly or annual salary basis.	Payment is dependent on the successful completion or milestone achievements of the contract services i.e. based on the achievement of the specified result.
Commercial Risks	An employee generally bears no legal risks in respect of the work (subject to certain legal qualifications). As the employee works in the business of the University, the University is legally responsible for any work performed by the employee that is performed within the scope of employment including negligence or substandard work.	A contractor bears legal risk in respect of the work they undertake. They have the potential to make a profit or loss, and must remedy any defective work at their own expense. Contractors are ordinarily responsible for their own insurances (e.g. public liability and professional indemnity insurance) to insure against any risks associated with the provision of their services to the principal.
Ability to subcontract/delegate	An employee is personally engaged to perform the work and has no inherent right to delegate performance of the role to others, unless authorised by the employer.	Unless otherwise specified in the contract, a contractor is free to subcontract or delegate the work to others – i.e. they can pay someone to do the work.
Tools and Equipment	The University, except when specifically agreed otherwise, usually provides tools and equipment.	Generally, a contractor provides their own tools and equipment.
Manner of Performance	An employee performs work at the request of the University and the work is an integral part of the business of the University.	A contractor maintains a degree of discretion as to how work is performed, although there may be requirements with materials used and method of performance. Although work of a contractor is done for the University's business, it is not integrated into it.
Place of Performance	An employee usually performs work on the University's premises.	A contractor can perform the work anywhere.
Hours of Work	An employee works standard or set hours usually determined by the University.	A contractor sets their own hours of work.
Expenses	An employee is generally reimbursed for expenses personally incurred by them in the course of performing their work, as long as they are authorised by the employer.	A contractor generally meets their own expenses.
Appointment	Generally an employee is recruited through an advertisement by the University or into a role described by the University.	A contractor is likely to advertise their services to the public at large. A contractor may be appointed following a competitive tender or expression of interest process.
Termination	The University reserves the right to dismiss an employee, in accordance with relevant industrial instruments.	The University may only terminate a contract without penalty if the contractor has not met the conditions of the contract. The contract contains terms dealing with breaches by either party.

1.2 Obligations on the University

The obligations of the parties to the contract vary depending on whether the individual is an employee or an independent contractor. The legal distinctions between these two forms of contract and the clear identification of the employer are very important as it affects:

- who is responsible for the provision of workers' compensation insurance;
- whether PAYG deductions must be made in accordance with the *Income Tax Assessment Act 1997* (Cth) and at what marginal rate (employee, ABN or no ABN);
- whether superannuation contributions are payable under the *Superannuation Guarantee (Administration) Act 1992* (Cth);
- whether payroll tax is payable;
- the conditions of employment such as hours, rates of pay, entitlement to leave, and so on;
- termination of employment, including responsibility for any subsequent claims of unfair dismissal; and
- loss or damage as a result of an individual's negligence during the course of their employment.

1.2.1 Pay As You Go (PAYG) withholding

PAYG withholding obligations will apply to the University in respect of various payments it makes. PAYG withholding is required (but is not limited to) the following payments:

- i. the payment of salary, wages, commission, bonuses or allowances the University makes to an individual as an "employee";
- ii. payments it makes for a supply where the payee does not provide an Australian Business Number (ABN).

"Employee" under the PAYG system means an employee at common law.

The University is required to withhold an amount from the payment it makes and remit that amount to the Australian Tax Office. Therefore, it is essential that the nature of the relationship, is determined at the time of employment or engagement.

To make this determination, these Guidelines and a Checklist have been developed to help establish the common law status of the individual who is being employed or engaged.

In circumstances where the University determines the relationship to be one of contractor and a payment is made to an entity, such as a company, trust or partnership (rather than an individual) there should be no PAYG withholding requirement provided the entity supplies the University with an ABN and documentary evidence of incorporation, establishment of trust or registration of partnership.

1.2.2 Payroll Tax

Payroll tax is calculated on wages paid by an employer to its employees and is charged by all Australian States and Territories. The definition of wages is very broad and includes wages, salary, allowances, commissions paid to employees but also payments made to certain independent contractors. The NSW Legislation deems contractors to be employees where a "relevant contract" exists.

A relevant contract is one where a person supplies services, for or in relation to work, to another person in the course of carrying on a business.

The exemptions from payroll tax include the following situations:

- Where services supplied are ancillary to the supply of goods under the contract;
- Where services supplied are not ordinarily required by the University and are provided by a person who ordinarily provides those services to the public generally;
- Where the services are ordinarily required for less than 180 calendar days in a financial year;
- Where the services are provided by one contractor for 90 working days or less in a financial year;
- Where the payments under the contract are above \$800,000 a year;

- Where the incorporated entity employs two or more persons to perform the work under the contract;
and
- Where the Commissioner in the particular state is satisfied that the contractor ordinarily renders services of the type under the contract to the public generally.

Because the definition of “relevant contract” is wide, the checklist will assist nominated supervisors to determine if payroll tax is payable on any payment made to contractors.

1.2.3 Workers Compensation

The University is liable to pay Workers’ Compensation premiums on payments made for essentially labour only services provided to the University under a contract for services.

Workers Compensation premiums are calculated on rateable remuneration. This includes: contract payments for essentially labour only services and payment to contractors who are or who supply deemed workers, including contractors who are companies.

1.2.4 Superannuation Guarantee Levy

The University is required, under the *Superannuation Guarantee (Administration) Act 1992* (**Superannuation Guarantee legislation**), to contribute towards the superannuation of some contractors.

Under the Superannuation Guarantee legislation, an employee includes a person engaged under a contract that is wholly or principally for labour. This means that a contractor (the party to the contract) can be considered to be an employee under the superannuation guarantee legislation. A contract is principally for labour if more than 50% of the value of the contract is for the person’s labour. Even if a contractor quotes an ABN, they may be considered an employee for the purposes of the Superannuation Guarantee legislation.

The superannuation guarantee legislation does not apply when a contract is made with someone other than the person who will provide labour. For example, there is no obligation under the superannuation guarantee legislation if the contract is with a company or partnership. Furthermore, if the contract stipulates that the individual is to be paid to produce a result (e.g. a lump sum payment following completion of the contracted service), no SGC is payable. A payment of less than \$450 is also exempt.

2 Procedures for Determining the Nature of the Relationship and Engaging an Employee or Independent Contractor

The procedures outlined below should be applied by nominated supervisors to clarify, validate and justify an employment status decision. Note: the usual University employment or procurement processes should be followed in conjunction with these procedures.

2.1 Determining the need for a service

A decision is made by the organisational area to employ or engage the services of an individual or service entity.

2.2 Establishing employment status

The determination of employee or independent contractor must be clearly specified before any engagement undertaking is given.

The individual or manager/National Head of School is required to accurately complete the Employee or Contractor Checklist.

The manager/National Head of School establishes the status based on the information in the Checklist and forwards the completed Checklist and other relevant documentation to the Member of the Executive (as defined in the University’s Delegations of Authority Policy and Register) for approval to proceed with an offer of employment or the engagement of a contractor.

If the recommendation is approved, the Member of the Executive returns the documentation to the manager/National Head of School to arrange appropriate documentation and processing. If the recommendation is not approved, the Member of the Executive discusses the matter with the manager/National Head of School.

2.3 Preparing the employment contract or contract for services

For deemed employees

Consider the options for temporary engagement of an employee: Academic sessional, casual, fixed-term.

Complete the relevant employment request documentation and obtain appropriate approval in line with the University's Delegations of Authority Policy and Register.

On receipt of the approved documentation from the nominated supervisor, Human Resources authorises and forwards an offer of employment to the employee in line with established processes for employing staff.

For independent contractors

The University's *Procurement Policy* applies to all engagements.

The manager/National Head of School prepares a contract for services, using the University's contract template available from the Office of General Counsel, and submits the draft contract to the delegated officer for authorisation.

Once the details of the contract for services have been settled and approved by the relevant delegated officer, all contracts for services must then be reviewed by the Office of General Counsel before forwarding to the contractor for execution.

It is the responsibility of the manager/National Head of School to retain copies of the Checklist and the offer/engagement documentation on file.

2.4 Processing the acceptance of offer

For deemed employees

Payment for hours worked will be processed when the following documentation has been completed and submitted to Human Resources:

- an accepted offer of employment (casual, sessional or fixed-term);
- a copy of the Checklist approved by the Member of the Executive;
- an online timesheet approved by the delegated officer (for casual employment only)

For independent contractors:

- the contractor submits invoices for services as agreed in the contract for services;
- invoices are authorised by the delegated officer for payment;
- a copy of the authorised Checklist and Contract for Services is submitted with the contractor's first invoice for payment
- all authorised invoices are submitted to Finance (Accounts Payable) and processed through the general ledger for payment in accordance with University procedures.

3 Further information

- [Australian Taxation Office](#)
[Individuals – Employee or contractor - what's the difference](#)
[Business – Employee or contractor](#)
[Employee/contractor decision tool](#)

- **Contacts:**

Human Resources (for employment matters)

HR@acu.edu.au or extension 4222

Office of General Counsel (for contractual documentation matters)

ogc@acu.edu.au or extension 2453

Finance (for contractor payments matters)