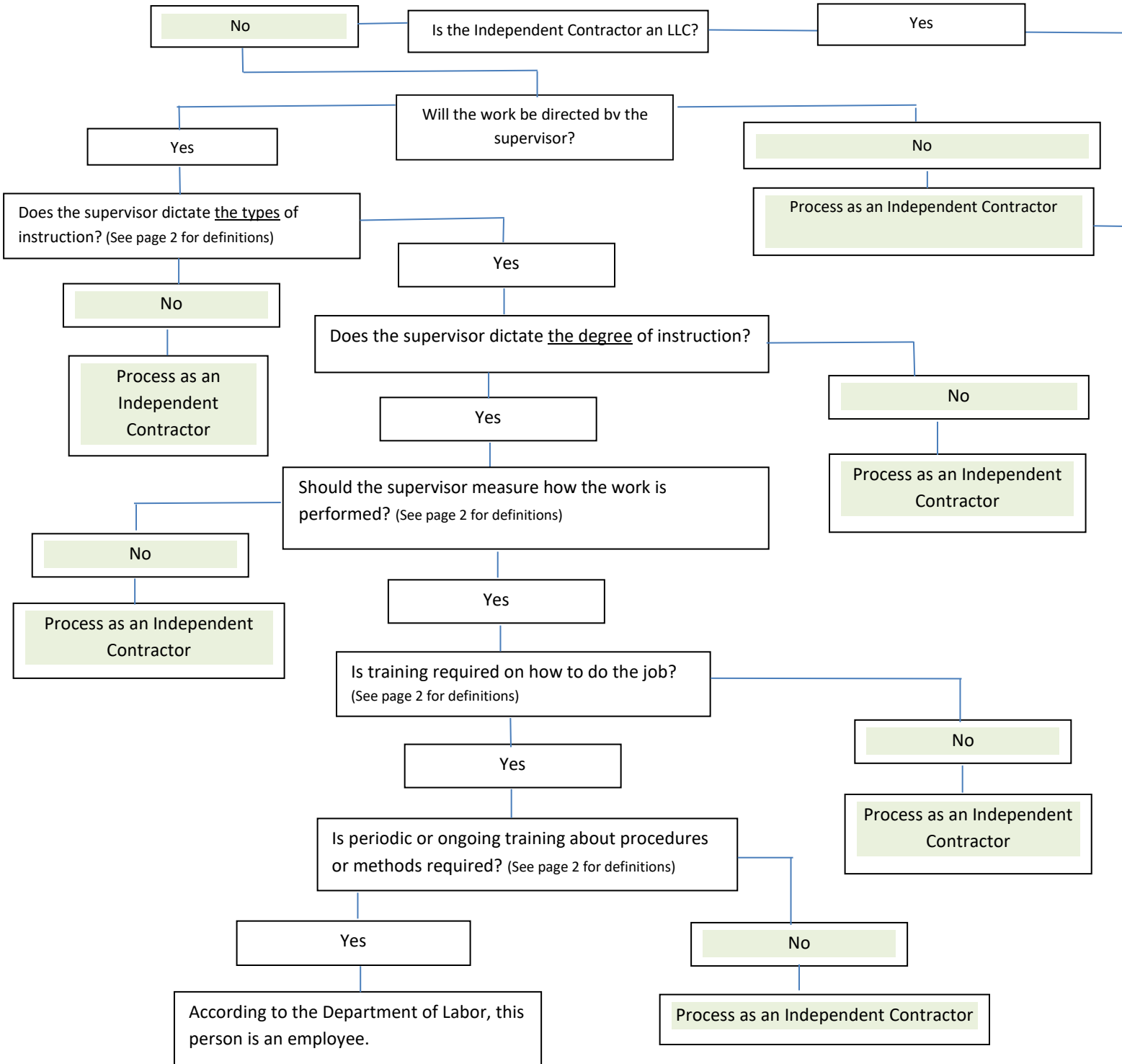


**Employee vs. Independent Contractor  
 Decision Tree**



PI/Program Director Signature: \_\_\_\_\_ Printed Name: \_\_\_\_\_

Final decision is circled and initialed? Yes \_\_\_\_\_ No \_\_\_\_\_ Date: \_\_\_\_\_

HR Representative: \_\_\_\_\_ Date: \_\_\_\_\_

## Employee vs. Independent Contractor - Guidelines

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According to the Department of Labor, there are several factors that determine when someone is an employee versus an Independent Contractor. Misclassification will result in Department of Labor penalties and IRS fines for the institution. Careful attention to avoid misclassification is required. Wishing to avoid the institutional fringe rate is not an allowable justification for retaining an Independent Contractor.

Classifying a worker as an independent contractor rather than as an employee may appear to result in financial savings and less paperwork. However, if the employee is misclassified as an independent contractor, these perceived advantages are offset by the potential penalties that could be assessed by the Internal Revenue Service (IRS) or New York State Department of Labor, by potential Workers' Compensation or unemployment claims, and by liability or malpractice suits.

Operating locations should ensure that workers are properly classified when reviewing application budgets and when hiring an employee or [engaging an independent contractor](#). If at any time an operating location cannot make a determination, the Central Office of Employee Services will provide assistance.

**Note:** The Research Foundation (RF) is legally obligated to properly classify workers even if a sponsor provides funds for independent contractors in an award.

There are several factors that must be taken into consideration when making the determination as to whether someone is classified as an employee vs. an Independent Contractor. Please use this decision tree to guide you in making this determination and HR may request additional information as necessary to avoid a misclassification.

**Behavioral Control** - Behavioral control refers to facts that show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work.

The behavioral control factors fall into the following categories:

1) Types of Instruction Given:

An employee is generally subject to the business's instructions about when, where, and how to work. All of the following are examples are types of instructions about how to do work.

- When and where to do the work;
- What tools or equipment to use;
- What workers to hire or to assist with the work;
- Where to purchase supplies and services;
- What work must be performed by a specified individual;
- What order or sequence to follow when performing the work.

2) Degree of Instruction:

The more detailed the instructions, the more control the business exercises over the worker. More detailed instructions indicate the worker is an employee. Less detailed instructions reflect less control, indicating that the worker is more likely an independent contractor.

Note: The amount of instruction needed varies amongst positions and/or jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals and in other cases, the tasks

may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

3) Evaluation System:

If an evaluation system measures the details of how the work is performed, these factors would point to an employee. If the evaluation system measures just the end result, then this can point to an independent contractor.

4) Training:

If the business provides the worker with training on how to do the job, this indicates that the business wants the job done in a particular way. This is strong evidence that the worker is an employee. Periodic or on-going training about procedures and methods is even stronger evidence of an employer-employee relationship. However, independent contractors ordinarily use their own methods.

In addition to the above factors in making your decision, the below guidance also leads to the decision as to whether someone is an Independent Contractor or that of an employee.

**Financial Independence**

1) Significant Investment

An independent contractor predominantly has significant investment in regards to the tools/resources required in order to complete a task, whereas an employee relies on their employer to provide these resources.

2) Unreimbursed Expenses

An Independent contractor is more likely to have unreimbursable expenses whereas an employee relies on their employer to provide reimbursement for job-related costs. Fixed ongoing costs are incurred regardless of where the work is being performed.

3) Opportunity for profit/loss

Does the worker have a possibility of incurring a loss, meaning that costs they incur is greater than they are getting paid

4) Services made available to general public

An Independent contractor provides the same services to other companies and individuals at a set market value rate that they would provide to Downstate (i.e. running assays, preparing surveys, project management, etc.). This service should be verifiable, i.e. website, advertising, resume, etc.

**Relationship**

An independent contractor must have a specific Scope of Work with deliverables clearly outlined in a contractual manner to identify the relationship whereas an employee's relationship is clearly defined by hire and guided by an employee handbook rather than a written contract.

a. Benefits

An employee receives benefits, vacation time, etc. whereas an Independent Contractor does not

b. Permanency

If the relationship between the two parties is for a specific project or period, this leans towards an Independent Contractor relationship. If there is no specific project or time period for the work to be done and is an ongoing relationship, this leads to that of an employee.

c. Key activity of business / Core function of program

Are the services being provided a key component of the business? If so, this would lead to an employee/employer relationship.

Related Policy:

Engaging an Independent Contractor

Related Forms:

Independent Contractor document package