

# DAS Directive

Directive No. **HR-D-13**  
Effective Date: **09-01-2009**



To: All Appointing Authorities and Personnel Officers  
From: Hugh Quill, *Director of Administrative Services*  
Re: Independent Contractor Guidelines

---

## PURPOSE

To establish uniform guidelines and policies for contracting with independent contractors. These guidelines apply to appointing authorities with job classifications established under section 124.14(A) of the Ohio Revised Code.

## GENERAL

Pursuant to section 124.14(A) of the Revised Code, the director of the Department of Administrative Services is to establish a job classification plan for all employments, the salaries of which are paid in whole or in part by the state. Appointing authorities with service needs that cannot be fulfilled with traditional employee appointments may enter into a personal services contract for the purpose of contracting for the performance of those services. Prior to contracting, careful consideration should be taken to determine whether the respective job responsibilities are that of a state civil service employee as defined in Revised Code section 124.01, or that of an independent contractor. This careful examination of the job responsibilities is necessary in order to prevent potential conflict with current state employees as well as subsequent determinations that the independent contractor is acting as an employee. Black's Law dictionary defines an independent contractor as, "One who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. (Black's Law Dictionary, 7th Ed. 1999).

While there are numerous things to consider in determining whether or not the use of the independent contractor is appropriate, some of the important issues to be considered by the appointing authority include:

- (1) An independent contractor is paid a fee or other payment by contractual arrangement for particular services.
- (2) Personnel of the appointing authority usually do not control or supervise the manner of an independent contractor's work. Independent contractors are not eligible for employee fringe benefits such as vacation or sick leave, and do not appear on a public payroll.
- (3) Independent contractors are generally required to provide their own supplies and equipment and to provide and pay assistants if necessary.
- (4) Independent contractors receive a Form 1099 for income tax reporting purposes and are not eligible for workers compensation coverage.

# DAS Directive

Directive No. **HR-D-13**

Effective Date: **09-01-2009**



- (5) The work to be performed by the independent contractor is seen as temporary as opposed to permanent.
- (6) The independent contractor is still subject to certain guidelines established by the appointing authority including providing the hours in which the independent contractor can perform work at the appointing authority's work site.
- (7) The independent contractor is not supervised and does not perform a supervisory function over any civil service employees.

## Established Criteria of an Independent Contractor

Level of Control is a common criterion established in common law and by the Internal Revenue Service ("IRS"), Department of Labor and Public Employee Retirement System ("PERS") in determining whether a particular individual is a state civil service employee or independent contractor as used by the employer.

Guidelines have been established which provide the general characteristics possessed by a civil service employee and contrast those characteristics with those generally possessed by an independent contractor. Some examples of independent contractors currently being used in the state system include medical personnel at the state's penal institutions as well as consultants used for information technology projects.

Factors to weigh in determining whether a worker is a state civil service employee or an independent contractor include, but are not limited to:

- a. A worker who is required to comply with instructions about when, where and how the worker is to work beyond the general instructions set forth in the personal services contract is ordinarily a state civil service employee. The employer's right to instruct, not the actual exercise of that right, is a key factor. Instructions may be oral or written (e.g., procedures and manuals).
- b. Beyond general orientation training, specific training of an independent contractor by an experienced employee who works with the independent contractor is a factor indicating control because the specific training indicates that the employer wants the services performed in a certain manner. Independent contractors ordinarily use their own methods and receive limited training from the state agency that purchases the independent contracting services.
- c. If services must be rendered personally and the employer is more interested in who does the job and the particular methods used rather than getting the job done and the result of the services rendered, the worker may be considered an employee.
- d. Hiring other than in a personal services contract or other contractual relationship, supervision beyond general contract requirements and payment by an employer are some of the factors that generally reveal control over persons on the job.

# DAS Directive

Directive No. **HR-D-13**

Effective Date: **09-01-2009**



- e. If a worker, as part of his performance, hires supervises and pays assistants under a written contract to provide materials and labor, the worker may be an independent contractor.
- f. The existence of a continuing relationship between the worker and the employer may indicate an employer-employee relationship. A continuing relationship may exist when work is frequently performed, or when the contract is long term or regularly renewed.
- g. If the employer sets the hours of work, that may be indicative of control. However, if the independent contractor is required by the nature of the work to perform the work at a certain location, the independent contractor may be limited to the operating hours of that agency or institution. In addition, the personal services contract executed by the parties may indicate a certain number of hours estimated to be worked each week in order to meet a deadline.
- h. An independent contractor is free to work for as many employers as he or she chooses as long as the other work does not create a conflict of interest. An employee generally works full or part time for one employer.
- i. The location where the work is performed might indicate an element of control. If the work is performed on the employer's premises, an element of control is implied, only if the work could be conducted elsewhere. Likewise, if the worker uses the employer's tools, materials, etc., that is indicative of control unless this usage was determined to be a consideration as part of the compensation package in the personal service contract. In contrast, if the worker makes a significant investment in the facilities he or she uses (e.g., rents an office from an unrelated party), the worker would tend to be an independent contractor.
- j. If the employer directs how the work must be performed (e.g., the sequence of tasks, regular reports, the manner in which something is to be accomplished), the worker is likely an employee beyond the guidelines or request for deliverables set forth in the personal services contract.
- k. Employees are typically compensated for work done by the hour, week or month. Independent contractors are typically paid by the job, by the deliverable or on a commission basis.
- l. If a worker can make his or her services available to the general public, he or she would tend to be an independent contractor.
- m. A state employer has the right to discharge a civil service employee. The services of an independent contractor are terminated for breach of contract, or with the expiration of the personal services contract.
- n. If there is an opportunity for profit and loss, the worker is likely to be an independent contractor.

## Assessment of Agency Needs

A multi-step analysis is required to assess agency needs. First, an agency must determine whether the worker's function is that of an independent contractor. Then, the agency must

# DAS Directive

Directive No. **HR-D-13**  
Effective Date: **09-01-2009**



apply the guidelines set forth below to determine whether the worker's function is inherently governmental. This determination involves an assessment as to whether the worker's function is so intimately related to the public interest that the work is more properly performed by a governmental employee. As a guide, ask the following questions:

1. Does the work involve policy making or is it managerial in nature? Final determinations as to administrative actions or the establishment of policy should be made by a governmental employee.
2. Is the work to be performed within the scope of a project, initiative or study which has specified time parameters that establish a date of commencement and a date of completion or is the work within the scope of a new or established program or service provided by a state entity?
3. Is the independent contractor justification being used to circumvent personnel ceilings, pay limitations or employment procedures?
4. Is the contract to be awarded to a former agency employee?
5. Will the contractor aid in influencing or enacting legislation?
6. Is the independent contractor's particular expertise available within the agency or from another agency?

If the answer is "yes" to questions 2, 3, 4, 5 or 6 it may be that the worker's function is inherently governmental and should be performed by a governmental employee.

If the function is not inherently governmental, involves independent judgment, extended analysis and advanced training, an agency should determine whether the service is personal in nature, involves a temporary task and/or requires expertise beyond the resources currently available to the state employer and, therefore, appropriate for a personal services contract. The agency should also determine whether the service is a regulated profession under Title 47 of the Ohio Revised Code. Many of these professions have state job classifications.

Each appointing authority is to evaluate the functions of its workers to determine whether the individual worker is an independent contractor or a state civil service employee. If the individual worker functions as a civil service employee, every effort should be made to place the individual into an appropriate civil service job classification so that appropriate IRS, PERS and other employee withholdings may be made. Temporary employees hired through an employment agency or temporary service should have employee withholdings made through that service.

## Selecting an Independent Contractor

Typically, the duration of service of an independent contractor should not be long term, and contractors should not be hired to perform work that could be performed by civil service employees. Long-term services may be acquired through seasonal, intermittent, part-time

# DAS Directive

Directive No. **HR-D-13**

Effective Date: **09-01-2009**



or permanent state employees. Contracts may not cross over the biennium, but may be renewed when necessary.

- Check contractor's references to ensure that the contractor can perform the work.
- In preparing the personal services contract, ensure that the statement of work or scope of services defines as precisely as possible the product of the contractor's work including any deliverables and payments associated with the referenced deliverables.
- Include a quality assurance plan or invoke a project management process to evaluate the contractor's work, in order to ensure that quality and value are received by the agency.
- Eliminate conflicts of interest through competition where possible. Some contracts require a competitive selection process. Avoid allowing the contractor to steer the agency toward follow-on contracts, or contracts that provide for extending the relationship between the employer and the independent contractor or other actions that may create the existence of an employee relationship for the contractor. Avoid career contractors.
- Include a contract provision requiring the contractor to acknowledge the intent of the parties that the contract establishes an independent contractor relationship and the independent contractor is not to be considered a state employee for any purposes, including but not limited to the application of the Fair Labor Standards Act, Social Security Act, Federal Unemployment Tax Act, Federal Insurance Contribution Act, the provisions of the Internal Revenue Code, Ohio tax law, workers' compensation law and unemployment insurance law.
- Use the following, or include a contract provision that states in essence:

The contractor agrees that it is a separate and independent enterprise from the state and from your agency and that it has a full opportunity to find other business and has made an investment in its business. Moreover, the contractor will retain sole and absolute discretion in the judgment of the manner and means of carrying out the contractor's activities and responsibilities under the contract. The contract is not to be construed as creating any joint employment relationship between the contractor and the public agency or the State of Ohio.

- For complex and/or expert relationships, develop a Competitive Sealed Proposal or Request for Proposal ("RFP"). Much of the RFP's content can be incorporated into

# DAS Directive

Directive No. **HR-D-13**

Effective Date: **09-01-2009**



the contract which will establish the parameters, scope of services, contract scope and renewal options of your selected contractor.

This directive supersedes any previously issued directive or policy and will remain effective until canceled or superseded.

## AUTHORITY & REFERENCES

OAC 123:1-45-01

Office of Federal Procurement Policy Letter 92-01. Model Independent Contractor Agreement for Services (available from DAS)

Section 2-302 of the Model Procurement Code for State and Local Governments (ABA/ALI). Available from the Department of Administrative Services.