

Guidelines on Agreement for Contract for Services

1. Introduction

-Employment Agreement (Agreement of Service) applies to a person who is an employee of the University

-Contractor Agreement (Contract for Services) applies to a person or entity who is an independent contractor

In most cases a casual or fixed term employment agreement is the appropriate course. The Employment Relations Act 2000 (ERA) requires stated grounds for such short or limited arrangements, e.g. a specific project, translation services, lecturing services. The University preference is for employment agreements however the University accepts that for some situations it is appropriate to have a Contract for Services.

To determine the correct arrangement you need to assess whether the individual is an employee or contractor. The Inland Revenue Department (IRD), the Employment Authority and courts have determined various tests to determine the 'real relationship'. The following table demonstrates the main principle differences between being an employee or a contractor;

2. Employee or Contractor?

Employee	Contractor
Agreement <u>of</u> Service	Contract <u>for</u> Services
-employed by an entity (under an employment agreement)	-independent business or service (sole trader, partnership, trust or company)
- payment of wages/salary	-lump sum payment -withholding tax deducted (if applicable)
- under supervision of another person - employer can control what, how, when, hours of and where the employee will work	- responsible for management of work output - provides own tools, transport, skills - choose whether to be available - has choice of whom they work for
- employee attends a workplace (cannot send someone else in his/her place)	- can sub-contract to another person to provide that service
- right to suspend or dismiss	- cannot be "dismissed" - law of contract

3. Existing Employees

- (a) If an individual is an existing employee of the University a Contract for Services is not appropriate. There are risks associated with both tax (IRD) and ERA requirements in regard to the nature of the relationship. There are other implications for the University in regards to existing on-site employment agreements.
- (b) If the individual is an employee for another organisation then it is unlikely they will be a contractor.
- (c) For Research contracts. In same case these contracts are 3rd party contracts as a result of a Prime Contract with another organisation.

In any of the above situations obtain full details of the proposed arrangements and discuss with your Research Adviser or HR Divisional Manager before proceeding with formal arrangements.

4. What Are The Essential Differences Between an Employment Agreement and a Contract for Services?

Agreement of Service (Employee)

- is subject to common law and the provisions of the Employment Relations Act (ERA)
- Employees are usually paid for a number of hours, which does not necessarily relate to their output.
- If an **employee** is injured at work, under the Accident Insurance Act the employer has liability for 80% of income.

Contract for Services (Contractor)

- is **not** subject to the provisions of the ERA, breaches of contract are found in common law and statute law. If you are suing for damages under 'breach of contract' a loss of some kind must have been incurred as a result of the breach.
- Contractors provide certain 'outputs' for a defined price.
- There is no statutory requirement in respect of independent contractors to provide for holidays, sick pay, accident insurance, minimum levels of remuneration or maternity leave, or to pay PAYE or FBT, deduct union fees, pay for hours when there is no work and so on.
- There is no access to the disputes procedure provided under the ERA.
- Withholding tax is normally deducted.
- Contractors must arrange payment of the ACC levy separately.

5. Procedure for Entering into a Contract for Services

If you believe that a Contract for Services would be appropriate, the following procedure should be followed in formalising the Contract: **It is important to clearly define where the funding for the position is coming from: departmental budget OR research OR other external funding source.**

CHECK: that you have delegated financial approval to negotiate a Contract for Services.

Non Research Funding Contracts Process

- a. Download the University Contract for Services template attached to this guideline and complete as indicated.
- b. Once completed, forward electronically to your HR Divisional Manager for final checking. *There should be neither new clauses added nor clauses removed from the template.*
- c. On receipt of approval to proceed from the HR Divisional Manager arrange with Contractor for them to **sign the contract and initial each page (bottom right)**.
- d. Forward the Contract to the HR Divisional Manager for signature on behalf of the University.
- e. The original contract is returned to the Department for filing;
 - A copy is retained by the HR Divisional Manager and information entered in central database
 - A copy is sent to the Accounts Manager, Finance Division for reference for payment purposes

Research Funding Contracts Process

Note: Due to the nature of the contract for services environment Research and Enterprise office have a separate specific contract template – please complete with your Research Adviser.

- f. If the funding is research or grant based then you need to contact the Divisional Research Adviser from Research and Enterprise. This should be when you are at the early stages of making an application to the funder. The decision on whether the staff required for the research will be an employee or contractor will impact on the content of your application and accuracy of your budget.
- g. Complete the template with the Research Adviser. On completion of the template the Research Adviser will work through with you the Contract for Services document. The Research Adviser will then ensure that the Contract is signed on behalf of the University.
- h. The original contract is held on file at the Research and Enterprise office.
 - A copy is sent to the Researcher and Divisional Administrator
 - A copy is sent to the Accounts Manager, Finance Division for reference for payment purposes

The Contractor must not start performing the services until the contract has been signed by both parties.

6. Withholding Tax

Withholding Tax is an IRD (Inland Revenue Department) tax requirement and is deducted at source where the recipient is not an employee.

An IR330 form is required to be completed by the Contractor otherwise an additional rate is applied ('no declaration rate') which is on top of the required withholding tax deduction.

A contractor may have a Certificate of Exemption which allows them to receive full payment without the deduction of withholding tax. This should be noted in your Contract for Services document.

Different withholding tax rates apply to different activities and you should check this with your Adviser. However, in general the University deducts 20% withholding tax from the amount owing to the contractor unless an exemption certificate applies. For Non Resident Contractors different rates apply; again the contractor could obtain an exemption certificate for the New Zealand IRD.

7. Plain Language Explanation of Clause 2.18 and Clause 2.19

Clause 2.18 of the agreement template allocates responsibility between the University and the Contractor for claims which may arise in connection with the services which are to be provided. Under that clause the Contractor accepts liability for claims which arise as a result of the Contractor's breaches - either breaches of the agreement itself, or breaches of the requirements of the Contractor's profession.

Clause 2.19 records that the University arranges liability insurance for Contractors, other than Contractors - such as medical professionals - who will already have equivalent cover. Arranging liability insurance by the University is an automatic process and does not require further documentation.

If a Contractor does face liability, the insurance cover can be expected to protect the Contractor personally, except to the extent of the policy excess. It is important to note that clause 2.19 records certain disclosure obligations which apply in respect of the insurance. If the Contractor is responsible for a failure to observe those requirements, and there is no insurance cover as a result, or if the breach is outside the terms of the cover, the Contractor may be personally liable under clause 2.18.

Note: When completing the Agreement, ensure the Contractor deletes what does not apply under 2.19 (d), e.g. (i) The contractor does hold professional indemnity insurance **OR** (ii) The contractor does not hold professional indemnity insurance.

**Proceed to the tables to determine the correct
relationship for your situation**

8. Complete the following tables to determine the correct relationship

A. The **control test** has been the most common test utilised to distinguish between independent contractors and employees. The test analyses the nature and degree of detailed control exercised by the employer over the worker. The greater the degree of the control by the employer, the more likely it is that the worker is an employee.

TABLE A -- CONTROL TEST	A	B
Does the potential contractor have control over how, where and when the services are performed (within practicality)?	Yes	No
Is the potential contractor responsible for the quality and pricing of the services to be provided?	Yes	No
Will the potential contractor supervise the provision of services and can the Potential contractor hire other people to perform some or all of the services?	Yes	No

B. The **integration test** (also known as the organisation test) is based on the notion of an employee as being part and parcel of the organisation in which he/she is employed. By way of contrast, an independent contractor, although doing work for a business is not integrated into the business, and is only an accessory.

TABLE B – INTEGRATION TEST	A	B
Are the services to be provided by the potential contractor different from work usually performed by Employees of the University?	Yes	No
Will the potential contractor pay for any expenses incurred in performing the services? e.g. use of the University's phones and administration services.	Yes	No
Will the potential contractor invoice the University for the services provided?	Yes	No
Will the potential contractor be paid only as the services are performed as opposed to a regular salary payment?	Yes	No
Are the services to be performed by the potential contractor 'one-off' as opposed to there being a continuous need for the services?	Yes	No
Does the potential contractor have a Staff ID Card?	No	Yes

C. The **independent test** focuses on the manner in which the worker ordinarily performs his/her business or work, including their economic involvement (for example, an independent contractor can make an economic loss from a contract).

TABLE C – INDEPENDENCE TEST	A	B
Will the potential contractor supply or be charged for the necessary tools, vehicles, office, phone, computer etc to perform the services?	Yes	No
Will the potential contractor be free to work for other organisations?	Yes	No

Does the potential contractor have their own client base?	Yes	No
Does the potential contractor advertise their services?	Yes	No
Would the University be required to pay GST in addition to any payment for the services performed by the potential contractor?	Yes	No
Does the potential contractor pay tax, ACC and insurance directly?	Yes	No

D. The **economic reality test** involves examining the total situation of the work relationship to determine its economics reality. This includes having regard to circumstances prior to entering into the contract and the conduct of the parties since.

TABLE D -- ECONOMIC REALITY TEST	A	B
Would the potential contractor be exposed to normal business risks in the provision of the services to the University?	Yes	No
Would the potential contractor be liable for correcting sub-standard work?	Yes	No

E. Finally, the **intention test** examines the intention of the parties in the relationship. Usually, intention is demonstrable from the express terms of the contract between the two parties. However, the contract must be consistent with the actual circumstances and conduct of the parties to the relationship.

TABLE E – INTENTION TEST	A	B
Would the potential contractor be performing services which had been performed by independent contractors?	Yes	No
Could the University sue the potential contractor for loss resulting from the provision of services?	Yes	No
If the services were not performed to the standard specified in the proposed contract with the potential contractor, could the University withhold payment?	Yes	No
Has the potential contractor specifically stated that they want to provide services to the university as an independent contractor?	Yes	No
Has the potential contractor always worked with the University as an independent contractor?	Yes	No

If all of the responses to the questions in Tables A-E are in column A, then the relationship is that of a Contractor (Contract for Services)

If one or more of the responses to the questions in Tables A-E is in column B, then the Manager answering the questions should contact HR Divisional Manager or Research Adviser (Research & Enterprise) for assistance before proceeding.