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BEAR TRACKS COUNSEL NEWSLETTER
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Employee or Independent Contractor:
What's the Difference? And Why Does it Matter?

On January 20, 2021, the Biden Administration issued an Order barring an eleventh hour Trump Administration change to standard worker classification are made, either employees or independent contractors, under the Fair Labor Standards Act. This new Trump standard was widely viewed as business-friendly because it would have allowed workers to be classified as independent contractors rather than full-time employees, with resulting tax and benefit implications and cost savings to employers.

Employers are required to withhold certain income taxes and make Social Security, Medicare, and unemployment tax payments in employee paychecks. However, employers typically do not have to withhold or pay taxes on payments made to self-employed independent contractors.

It is likely that the Biden Administration will issue new proposed regulations in the spring/summer time frame. In the meantime, in this area of continued scrutiny, how do you determine if a worker is a Brown employee or an independent contractor? Control is the key. If the University is dictating all the terms, and doing so consistently over time, the person is likely an employee.

Individuals are typically Brown employees if: 100% of their work hours are spent performing the skills of their position at Brown and they are paid a regular salary or wages; the work schedule is determined by Brown; training, materials, equipment, and tools needed to perform the employee's work are provided by Brown; work is required to work on Brown's premises or under Brown's control; and work cannot be subcontracted.

Individuals are typically independent contractors if: work for Brown is done on a part-time or project basis on projects that Brown employees are not performing; work may be simultaneously performed for multiple companies; Brown provides a deadline project completion, but does not determine the specific schedule, hours or location of the work; work can be subcontracted; no training or materials are provided by Brown; typically paid a flat fee or by invoice once work is completed; and independent contractors hold their own business licenses, permits, workers' compensation, general liability, and professional liability insurance policies.

You may be asking yourself, why does this matter? Worker misclassification is a top priority for federal and state enforcement agencies and the consequences for misclassification can be significant. In addition to owing back pay, overtime and benefits to a misclassified worker, the employer may be ordered to pay back taxes, interest, and fines.

For additional resources and information:

- [Checklist](#) for determining worker status, complete prior to hiring.
- [Website](#) detailing the process for engaging an independent contractor, including a Professional Services Agreement (PSA) template that must be completed.
- Always review the University's [policy on signatory authority](#) before signing a PSA.

Questions: contact [Yani Hernandez](#)