Information Sheet – Employees, Independent Contractors and ‘Sham’ Contracting Arrangements

Purpose

The purpose of this information sheet is to provide guidance on effectively engaging Independent Contractors and avoiding sham contracting arrangements. This information should be read in conjunction with the Recruitment Procedure.

Further information can be found on the Fair Work Ombudsman – Independent Contractors web page.

Advice contained in this information sheet is of a general nature only. Consult your HR Advisor (refer to key contacts) if you have any questions or concerns about an employment arrangement.

1. When can I engage someone as an independent contractor?

An independent contractor is usually a self-employed worker who supplies their labour as part of a business they are conducting on their own account for multiple clients. An independent contractor will enter into a contract for services with the University and is usually paid to achieve agreed results within an agreed timeframe. They generally control how and when their work is performed.

An employee supplies their labour to an employer under a contract of service. As employees, University staff members are covered by the University of Adelaide Enterprise Agreement 2014 – 2017 (as amended) and are required to undertake work in a particular way in accordance with the University’s policies, practices and procedures. They usually report to a supervisor who will be responsible for their work direction.

To determine whether a worker really will be an independent contractor, you need to look at the whole working arrangement and examine the specific terms and conditions under which you want the work to be performed. Just because someone calls themselves an independent contractor, has an ABN or specialist skills or you only need them during busy periods doesn’t mean they are an independent contractor.

If you make a mistake and the person you engage is not an independent contractor, under the Fair Work Act 2009 (Cth), there are potentially significant consequences for you which may include:

- The worker can bring a claim for back-pay, accrued annual leave and/ or long service leave under the University’s Enterprise Agreement;
- The worker can bring an unfair dismissal or an adverse action claim; and
- You and the University may be required to pay a financial penalty.

Continued
1 When can I engage someone as an independent contractor? (Continued)

Look at each scenario carefully before you decide to engage someone as an independent contractor. The following is a check box list to assist you in making this determination. If you can tick any of the following boxes with respect to someone you are thinking about engaging as an independent contractor, please first speak to your HR Advisor as they might well be a staff member at law.

- Does the University direct the way the worker performs their work?
- Does the worker perform the work in hours set by the University?
- Does the worker work within, and are they considered to be part of the University?
- Does the worker have a University telephone number?
- Does the worker always perform the work personally, i.e. cannot delegate the work?
- Is the worker paid for time worked, rather than paid according to outcomes achieved based on quotes they provide?
- Is the worker an ‘individual’ rather than a corporation?
- Is the worker only performing work for the University, i.e. doesn’t have other clients?
- Does the worker only, or mostly, use tools and equipment supplied by the University to perform the work?
- If the worker uses their own tools and equipment, does the University reimburse the worker for this?
- Are risks of the work the worker performs insured by the University?

2 ‘Sham’ contracting arrangements

If you engage someone as an independent contractor but they are actually a staff member, the contract is a sham. A ‘sham’ contracting arrangement may mean that a person misses out on a range of entitlements that would be available to them under the University’s Enterprise Agreement. You expose the University to the risk of a claim being made under the Fair Work Act 2009 (Cth) for breach of the University’s Enterprise Agreement and/or underpayment.

It may also mean that other legal obligations that are binding on the University are being avoided, for instance, legal obligations pertaining to the payment of taxation and/or superannuation.

The University must not dismiss, or threaten to dismiss, a staff member in order to re-engage them (or another person) as an independent contractor to undertake the same work. Nor should a University staff member be asked to establish themselves as a sole trader, or an incorporated body, in order to perform work ordinarily performed by staff members of the University.

The Fair Work Act 2009 (Cth) protects staff members from ‘sham’ contracting arrangements and imposes significant civil penalties on employers, as well as staff members, who are found to have deliberately misrepresented an arrangement as an independent contracting arrangement.

If the University is found to have contravened the sham contracting provisions of the Fair Work Act 2009 (Cth), then the Fair Work Commission may make a number of orders against you and the University which include;

1. Fines against the University of up to $54,000 per instance;
2. Fines for you personally of up to $10,800 per instance;
3. Reinstatement of a dismissed person; and
3 Restrictions on Re-engaging Former University Staff as Independent Contractors

Special care should be taken when considering engaging a former University staff member who accepted a voluntary redundancy. The University’s Enterprise Agreement specifically restricts the re-employment of such people within 2 years of their acceptance of a voluntary redundancy, unless you have authority from the Vice-Chancellor. The University only condones the engagement of such a staff member in circumstances of critical business need because of the significant risks which include:

1. Potentially undermining the genuineness of the redundancy;
2. Exposing the staff member to having the favourable tax treatment of their redundancy overturned by the Australian Tax Office; and
3. Creating a sham contract.

If you find yourself in this situation, contact your HR Advisor before engaging the former staff member.

4 University Consultancy Service Agreements

The University engages its contractors under University Consultancy Services Agreements. These documents should be registered as legal documents through the University Contracts Register and in each case demonstrate that the arrangement is truly commercial in nature.

If there is no written commercial agreement (for example, no University Consultancy Services Agreement) between the University and a person undertaking work for the University as an independent contractor, there may be a strong argument that the person is, in fact, a staff member of the University and should be engaged and paid in accordance with the terms of the University’s Enterprise Agreement.

Further Information
If you require further information, please contact Human Resources.