


Date: October 16, 2019

Code: TECHNICAL LETTER
HR/Salary 2019-16

Reference: HR/Salary 2003-10

Supersedes: HR 2003-21

To: Associate Vice Presidents, Human Resources
Associate Vice Presidents, Faculty
Procurement Officers

From: Tammy Kenber 
Associate Vice Chancellor, Human Resources

Arun Casuba
Executive Director Strategic Sourcing and
Chief Procurement Officer
Business and Finance

Subject: CSU Independent Contractor Guidelines - Independent Contractor vs Employee Determinations

Summary

The purpose of this technical letter is to provide comprehensive guidelines for campuses to use when determining whether to engage independent contractors to perform services through or by a CSU contract. This technical letter supersedes HR 2003-21.

Action Item(s)

Campus human resources and procurement offices, as well as other campus designee(s) responsible for all or a portion of the independent contractor process should review this technical letter in its entirety to ensure compliance. Campuses are responsible for making independent contractor determinations and may refer to the attached CSU Independent Contractor Guidelines for modifying or developing new campus procedures.

Affected Employee Groups/Units

N/A

Details

Federal/State laws and CSU policies mandate the circumstances in which workers can be considered independent contractors. It is important to review said laws/policies when determining the correct classification of workers as employees or independent contractors. This distinction is significant because an incorrect determination could result in the following:

- Wage liability, including overtime;
- Benefit liability, including retirement;
- Loss of reimbursement under Federal contract and grant funds;
- Penalties for violation of State and Federal tax withholding laws;
- Penalties for violation of Federal laws pertaining to the employment of nonresident aliens (Form I-9).

In addition, the following employment-related requirements may be violated:

- State Oath of Allegiance, as required by the California Constitution;
- State Political Reform Act financial conflict of interest rules;
- Workers' compensation and unemployment insurance coverage requirements.

Distribution:

Vice Chancellor, Human Resources
Executive Vice Chancellor/CFO
Office of General Counsel

Vice Presidents, Administration
Accounting Officers

An individual may only be retained for personal services as an independent contractor if a determination has been made, in accordance with appropriate Federal/State laws and CSU policies contained in the CSU Independent Contractor Guidelines.

General Information

Questions regarding this change may be directed to the CO Human Resources Management Team at hradmin@calstate.edu | (562) 951-4411. For your convenience, this memorandum is also available on the CSYou website at: <https://csyou.calstate.edu/Policies/HRPolicies/Forms/Default.aspx>.

TK/AC/br

Attachment

California State University

Independent Contractor Guidelines

October 2019

The California State University
Independent Contractor
Guidelines

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The California State University Independent Contractor Guidelines

INTRODUCTION

The objective of these guidelines is to provide direction, clarification, and best practices for the engagement of independent contractors within the CSU.

Campuses must comply with State/Federal laws and CSU policies regarding the proper classification of employees and independent contractors. Misclassification of a worker as an independent contractor can result in serious wage and benefit obligations, financial penalties, tax consequences, and other liabilities.

SECTION 1 - BACKGROUND

Federal/State laws and CSU policies mandate the circumstances in which workers can be considered independent contractors. There is no set definition of the term “independent contractor.” An independent contractor can be an individual person, a sole proprietorship, an incorporated entity, or other established firm or business. The label placed on a worker or business is not dispositive; rather, the determination whether a worker is an employee or independent contractor will be made based on the factors and legal interpretations of case law and statutes.

A worker can only be retained for professional services as an independent contractor if a determination has been made, in accordance with this guideline. Campuses are responsible for making these determinations and may refer to this document for developing campus procedures.

It is also important to note that under Federal law, a worker is either an employee or an independent contractor. An individual cannot be both an employee and an independent contractor for the same employer at the same time. For this reason, CSU adopts a single test for determining whether a person is an employee or independent contractor. That test is the one adopted by the [California Supreme Court in its *Dynamex Operations West, Inc. v. Superior Court* decision](#) on April 30, 2018, because it will yield a result that complies with all applicable classification rules. We will refer to this as the “Dynamex Test.” Significantly, this new “Dynamex Test” is more worker-friendly than the tests adopted by the IRS, Department of Labor, and other agencies.

For the purpose of this guideline, the CSU and the State of California must be treated as a single employer. In other words, an individual employed at a campus or state agency who seeks to perform services at another campus or state agency cannot be an independent contractor at that campus or state agency.

This guide is written for campus stateside independent contractor determinations. However, since this guide merely restates the current laws and the Dynamex court case, campus auxiliaries may use the information as reference. Auxiliaries must look to their legal counsel to ensure proper application of the law(s) and the Dynamex court case.

SECTION 2 - INDEPENDENT CONTRACTOR VS EMPLOYEE

Definition

Under the Dynamex Test, a worker is presumed to be an employee unless the CSU establishes each of the following requirements:

- (1) The worker is free from the employer's control and direction. This means that the hiring entity must not be able to control or direct what the worker does, either by contract or in actual practice; and
- (2) The worker performs a service that is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed. For example, a campus cannot hire a faculty in counseling to work as an independent contractor for the purposes of conflict resolution or hire instructors to teach a certificate program as independent contractors. Nor can a campus hire an independent contractor to perform IT services that are already being performed by campus staff; and
- (3) The worker customarily engages in an independently established trade, occupation, profession, or business. Factors relevant to this determination include whether the business is incorporated or licensed, whether the services are advertised, and whether the contractor also offers services to the public or other potential customers.

It is the campus' burden to satisfy (1), (2) and (3) to establish that the worker is an independent contractor. If it fails to establish any one of these three requirements, the worker must be treated as an employee. There are very few circumstances in which individuals can properly be considered independent contractors.

In light of the foregoing, before services are performed, campuses desiring to contract for professional services must assess the relationship with the individual and the campus to ensure that the individual is properly classified. Campuses must consider all of the facts and circumstances of each situation.

Determining Independent Contractor Status for Purposes Other than Wage/Hour Compliance

While other bodies of law, and the agencies that enforce them, apply different standards than that announced in Dynamex, to ensure consistency and to avoid incompatible classifications of workers, campuses must use the Dynamex Test set forth above in making any determination of independent contractor status. (Also see [AB 5, Chapter 296](#) which codifies the Dynamex decision.)

Other Limitations and Restrictions

State/CSU Contract Restrictions for CSU Current and Former Employees

Pursuant to [Public Contract Code \(PCC\) conflict of interest rules 10831-10832](#), campuses may not contract with current or recently separated CSU employees. Thus, an employee cannot be treated as an independent contractor when performing the same or similar services as those performed as an employee. While the PCC conflict of interest rules do provide a limited exception to this rule for employees with teaching or research responsibilities, tax guidelines prohibit treating an employee as an independent contractor when performing the same or similar services as those performed as an employee, regardless of the type of position held. See Appendix A for further details.

Considerations for Proctors, Readers and Graders

The CSU has an established practice of contracting with outside testing organizations to provide proctor, reader and grader services. These outside organizations often hire or contract with CSU employees to perform these services. Some of these testing organizations are funded by state contracts, including CSU contracts. HR/Salary 2003-10 states that CSU employees with teaching or research responsibilities who serve as proctors, readers or graders are able to contract with or be hired by a testing agency funded by a state or CSU contract to provide these services. To the extent HR/Salary 2003-10 conflicts with these new Independent Contract Guidelines, the new guidelines are controlling.

Considerations for Current CSU Faculty Members

On occasion, CSU faculty members may perform additional services at either their home campus or a different CSU campus. The faculty member must be treated as an employee with respect to compensation for the additional services. Note that language in the PCC conflict of interest code regarding exceptions for employees with teaching or research responsibilities does not supersede federal law. However, the collective bargaining agreement (CBA) between the CSU and the California Faculty Association and the CSU's policy on additional employment allow for faculty unit employees to perform work paid for by grants or contracts (up to specified limits), including contracts with state agencies, even if such work is not substantially different from the faculty member's primary employment (See CFA, Article 36.5(b)). Such additional employment must be compensated either through CSU as a state employee or as an employee through an auxiliary managing the contract, as appropriate.

Some faculty members have established their own consulting or other businesses and may offer their services to outside entities. However, such faculty members may not serve as contractors for the CSU, given their status as CSU employees. The campus could potentially offer them additional employment for such services, but only if the services they are seeking to provide meet the tests for allowable additional employment under the CBA and the CSU's [additional employment policy](#).

For questions about faculty additional employment, contact Academic Personnel at the Chancellor's Office.

CSU Conflict of Interest Code

The Political Reform Act of 1974 contains a general prohibition against conflicts of interest in public decision making. These restrictions apply to all CSU employees, without regard to whether they are required to file an annual conflict of interest form. While an employee with teaching and research responsibilities may be financially interested in a contract for the limited purpose of engaging in an activity for compensation which is sponsored or funded by the CSU through or by a CSU contract, the employee may not be involved in the campus' decision to enter into that contract. For further details see the [Conflict of Interest Handbook](#).

Foreign National Residency Status – for Employment and Tax Purposes

Campuses must determine residency status and/or Visa status prior to retaining an individual as an independent contractor. Failure to do so may result in the campus being unable to legally procure services and pay the independent contractor.

Background Check

The [Background Check Policy HR 2017-17](#) requires background checks for independent contractors if they perform duties that would require the background checks to be conducted if performed by CSU employees. In order for an independent contractor to operate under contract with the CSU or on CSU property, the independent contractors are responsible for attesting that the appropriate background check has been

completed. This includes independent contractors who are performing work subject to legal background check requirements.

Misclassification of Workers – Violations and Penalties

It is important to determine the correct classification of workers as employees or independent contractors. This distinction is significant because an incorrect determination could result in the following:

- Wage liability, including overtime;
- Benefit liability, including retirement;
- Loss of reimbursement under Federal contract and grant funds;
- Penalties for violation of State and Federal tax withholding laws;
- Penalties for violation of Federal laws pertaining to the employment of nonresident aliens (Form I-9).

In addition, the following employment-related requirements may be violated:

- State Political Reform Act financial conflict of interest rules;
- Workers' compensation and unemployment insurance coverage requirements.

SECTION 3 - PROCEDURES

Determination of Independent Contractor

Campuses are responsible for establishing or updating internal procedures to comply with the CSU independent contractor guidelines. The following general procedures may be used by campuses. It is important that the campus human resources and procurement offices, as well as other campus designees responsible for all or a portion of the independent contractor process be involved.

Step 1 – Review of the Dynamex Test.

The campus designee(s) must review the Dynamex Test articulated in Section 2 to ensure the individual can be classified as an independent contractor.

Documentation Required for Independent Contractor Status

Step 2 – Approval Document

As part of the determination and approval process, campuses should ensure the designee(s) has confirmed that the work to be performed can be done by an independent contractor and not an employee.

Note: Before moving-forward, the campus must ensure the independent contractor is legally able to work in the United States. See Step 4 for further details.

Step 3 – Engagement of Independent Contractor for Services

In accordance with [Executive Order 775](#), purchasing authority is delegated to the University President and by administrative appointment, the President's designee (i.e., the Director, Procurement & Contractual Services). The designee is responsible for ensuring all purchases of goods and services are made within the guidelines set forth by the [CSU Administrative Manual \(ICSUAM\) Section 5000 for Contracting and Procurement](#) and the laws of the State of California.

The engagement of an independent contractor for services is generally covered by the campus's standard requisition and general terms and conditions of service. A specific independent contractor agreement also may be used. Agreements must be reviewed and signed by the campus procurement/contracts office in accordance with CSU policy.

The following forms/documents may be required by the campus procurement/contracts office prior to retaining services:

- Campus Independent Contractor Approval Documentation (See Step 2)
- Requisition
- Scope of Work
- Proof of Insurance (including Certificate of Insurance with Additional Insured Endorsement)
- Proof of Background Check (If required)

Foreign National Independent Contractors

Step 4 – Check Residency Status for Employment and Tax/Reporting Purposes

For all services performed in the U.S. by an “alien” (not a U.S. citizen or U.S. national), the individual must submit valid work authorization. In order to process payment, the contractor must have an Individual Taxpayer Identification Number (ITIN) or Social Security Number. To calculate the proper rate of withholding, determine whether the contractor is a nonresident or resident alien and country of origin. Foreigners without residency may pay the same rates of US citizens, or 30% depending on type of income. A reduced rate or exemption may apply if there is a tax treaty. Note and track any restrictions on the length and frequency of work for these contractors.

Step 5 – Payment for Services

Payment for services may not be authorized unless the following conditions have been met:

- All agreements, including amendments, have been fully executed; and
- All the requisite documents have been received and approved (See Steps 2, 3 and 4 (if necessary)).

Submit Payment Documentation to Accounts Payable

Once service has been provided, the appropriate administrator must approve payment and submit the Vendor Data Record Form (STD 204) to the campus accounts payable office for payment.

Vendor Data Record form (STD 204)

The Vendor Data Record Form should be completed before work commences and must be completed before payment can be issued. This form is mandatory for all vendors paid by the campus.

Reportable Payments

- The accounts payable office will issue Form 1099, as required by law, to any independent contractor receiving payment(s) from the campus totaling more than \$600.00 within a calendar year.
- Payments of California source income to nonresidents of California, with certain limited exceptions, require seven (7) percent state income tax withholding on all payments that exceed \$1,500 in a calendar year. (see Revenue and Taxation Code Section 18662)
 - California nonresident payees must complete Form 588, 589 or 587 to verify the proper withholding requirements.
 - California resident payees must complete Form 590, Withholding Exemption Certificate, to verify California resident status. No state tax withholding is required with a valid withholding exemption certificate.
- Non-resident alien (NRA) independent contractors are handled on a case-by-case basis, as visa status and specific country treaties must be taken into account to determine tax withholding percentages.

SECTION 4 - FORMS

- Campus Independent Contractor Approval Documentation
- Independent Contractor Agreement plus Exhibits (must include Scope of Work)
- [Vendor Data Record Form \(STD 204\)](#)

SECTION 5 - REFERENCES

- [AB 5, Chapter 296](#)
- [Additional Employment Policy](#)
- [Background Check Policy HR 2017-17](#)
- [California Public Contract Code \(10831-10832\) - Restrictions for CSU Employees and Former Employees](#)
- [Conflict of Interest Handbook, Office of General Counsel](#)
- [Executive Order 775](#)
- [HR/Salary 2003-10](#)
- [ICSUAM – Section 5000, 900 Independent Contractors](#)
- [IRS Publication 15-A, Employer's Supplemental Tax Guide](#)

Public Contract Code Restrictions for CSU Employees

Pursuant to [Public Contract Code \(PCC\) conflict of interest rules 10831-10832](#), campuses may not contract with current or recently separated CSU employees. Thus, an employee cannot be treated as an independent contractor when performing the same or similar services as those performed as an employee. **While the PCC conflict of interest rules do provide a limited exception to this rule for employees with teaching or research responsibilities, tax guidelines prohibit treating an employee as an independent contractor when performing the same or similar services as those performed as an employee, regardless of the type of position held.**

Background

On January 1, 2004, SB 41 (authored by Senator Bowen) amended California law by removing the California State University (CSU) from certain civil service conflict of interest provisions located in the Public Contract Code. Instead, SB 41 created new Public Contract Code (PCC) sections that address certain CSU employee conflict of interest provisions related to contracting. **Based on the IRS rules and CSU Conflict of Interest Code restrictions, the exceptions found in the first two restrictions below have additional limitations, which are explained in the Questions and Answers section of this document.**

- ◀ **Restriction 1:** A CSU employee, except for those employees with teaching or research responsibilities, may not “contract on his or her individual behalf as an independent contractor with any California State University department to provide services or goods.” (PCC 10831)
- ◀ **Restriction 2:** A CSU employee, except for those employees with teaching or research responsibilities, may not engage in any employment or activity for which the employee receives compensation through or by a CSU contract, unless the employment or activity is within the course and scope of the employee’s regular CSU employment. (PCC 10831)
- ◀ **Restriction 3:** For two years following retirement or separation from CSU employment, no former employee may enter into a contract “in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by any CSU department.” (PCC 10832 (a))
- ◀ **Restriction 4:** For 12 months following retirement or separation from the CSU, no former employee may contract with the CSU if he or she was employed by the CSU “in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement...or separation.” Excepted are contracts for expert witness services and contracts to continue attorney services. (PCC 10832 (b))

Public Contract Code Restrictions for CSU Employees

Questions and Answers

Important: This Q&A addresses restrictions resulting from Senate Bill 41, IRS rules and CSU Conflict of Interest Code. Additional and outside employment opportunities for CSU employees also may be limited by restrictions in other state laws and collective bargaining agreements, not addressed in this document.

◀ **Restriction 1:** A CSU employee, except for those employees with teaching or research responsibilities, may not “contract on his or her individual behalf as an independent contractor with any California State University department to provide services or goods.” (PCC 10831)

- Can a CSU employee contract with a state agency other than the CSU to provide a needed service?

No, because the state agencies all make payments to employees as a single employer through the State Controller’s Office. The Internal Revenue Service (IRS) requires that all payments made by a single employer to an employee be reported on a W-2, not on Form 1099.

- Can a CSU employee with a specialized skill or expertise contract with the CSU to provide a needed service?

No. This violates the CSU Conflict of Interest Code. Additionally, as noted above, the IRS would require that payment be reported to the individual as an employee on a W-2.

- Are there any exceptions?

No.

- How can a CSU employee provide a needed service to the CSU?

*The CSU employee can be hired **as an employee** of the CSU (e.g., utilizing the “special consultant” classification), as long as the employment is not funded by a CSU contract with a vendor to perform services for or on behalf of the vendor).*

- Can a CSU employee be employed by and/or contract with a CSU foundation or auxiliary to provide a needed service or expertise?

CSU employees can be employed by or contract with the CSU foundation or an auxiliary, provided that the employees’ activities are not funded by a CSU contract between the CSU foundation or auxiliary and meet the definition of Independent Contractor.

- Can a CSU employee receive a “stipend” or “honorarium” payment through Accounts Payable for services provided to another CSU campus?

No.

◀ **Restriction 2:** A CSU employee, except for those employees with teaching or research responsibilities, may not engage in any employment or activity for which the employee receives compensation through or by a CSU contract, unless the employment or activity is within the course and scope of the employee’s regular CSU employment. (PCC 10831)

- Can a CSU employee have his/her activities funded by a CSU contract?

No.

- Can a CSU employee provide a needed service or expertise to the CSU if the employee is hired by a private sector entity to do work that is funded by a CSU contract?

No.

- Does this restriction apply to employee contracts with a CSU auxiliary, where the auxiliary has contracted to perform a service for CSU?

Yes.

- What determines if an employee’s work on an activity funded by a CSU contract is within the course and scope of the employee’s regular CSU employment?

A CSU employee's position description or employment agreement may identify activities that the employee might be required to perform on an activity funded by a CSU contract. However, it may be that an activity is only an occasional part of the employee’s job, and not specifically identified in the position description, but is within the course and scope of the employee’s regular employment. The CSU, as the employer (not the employee), appropriately determines whether the activity is within the course and scope of the employee’s regular CSU employment. If the CSU appropriately designates the activity as within the course and scope of employment, the employee can be compensated as an employee.

◀ **Restriction 3:** For two years following retirement or separation from CSU employment, no former employee may enter into a contract “in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract while employed in any capacity by any CSU department.” (PCC 10832 (a))

- Do “negotiations, transactions, planning, arrangements, or any part of the decision-making process relevant to the contract” include technical support?

If the separated employee provided limited technical support to the planning or procurement process as requested, but did not participate in planning or decision-making, the restriction does not apply.

- Can a separated/retired employee be rehired by the CSU as an employee to provide a service related to the selected vendor’s contract?

Yes. However, the timing of the hire must not conflict with CalPERS re-employment restrictions.

- Can a separated/retired employee who participated in the planning or procurement process contract with the CSU to provide a service related to the selected vendor's contract?

Yes.

- Can a CSU employee who participated in the planning or procurement process relevant to a proposed contract enter into that same contract after he/she retires or is otherwise separated from CSU employment?

No.

- Can a separated/retired employee who participated in the planning or procurement process contract with the selected vendor to assist the vendor in meeting its CSU contract obligations?

Yes.

- Can a separated/retired employee be hired as an employee by the selected vendor to assist in meeting the contract obligations?

Yes.

◀ **Restriction 4:** For 12 months following retirement or separation from the CSU, no former employee may contract with the CSU if he or she was employed by the CSU "in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement...or separation." Exempted are contracts for expert witness services and contracts to continue attorney services. (PCC 10832 (b))

- What is a policymaking position?

An employee in a policymaking position sets or recommends CSU policy. Management Personnel Plan administrators are in policymaking positions. Network analysts generally are not in policymaking positions. Each campus must review a separated/retired employee's prior position to determine its policymaking impact.

- What does "in the same general subject area" mean?

This language should be interpreted broadly. If an employee specialized in one area of, for example, human resources, that employee would be subject to the 12-month restriction from all areas of human resources. If a campus academic administrator managed the Business school, s/he could not contract for work developing a business curriculum.

- Can a CSU employee in a policymaking position who retires/separates provide services in his/her subject area on a contract basis to the CSU within 12 months of separation?

No. There are two limited exceptions: Contracts for expert witness services and contracts to provide continuing attorney services.

- Can a separated/retired employee in a policymaking position contract with a different CSU campus to provide services in the same general subject area?

No. Even though CSU campuses and the Chancellor's Office are separate employers, for the purpose of this restriction, a systemwide preclusion applies.

- How can CSU secure needed expert services or skills of former employees?

CSU can hire former employees as continuing CSU employees. This restriction does not prohibit the rehire of former employees or retirees. However, the timing of the retiree hire must not conflict with CalPERS re-employment restrictions.

- Can a CSU employee in a policymaking position who separated/retired provide contract services to another state agency other than the CSU within 12 months of separation in any area of expertise?

Yes. This restriction applies only to CSU contracts.

- Can a former employee in a policymaking position be employed by or contract with a foundation or other auxiliary to provide services to CSU in his/her subject area?

Yes. However, if the former employee is retired, the timing of the retiree hire and work to be performed must not conflict with CalPERS re-employment restrictions.

- Can a former employee in a policymaking position provide needed service or expertise to another state agency, if that agency has a contract with the state?

Yes. However, if the former employee is retired, the timing of the retiree hire and work to be performed must not conflict with CalPERS re-employment restrictions.