Appendix B

Independent Contractor versus Employee

When hiring someone in a foreign country, the law of that country determines whether the individual is an independent contractor (IC) or employee. Fortunately, countries generally apply similar factors to determine whether the individual is an IC or employee.

The most important factor is almost always the extent to which control is being exercised over how the work is being performed by the individual. The more control the university exercises over how the work is being performed, the more likely the individual will be deemed an employee.

If a department or unit is trying to engage an independent contractor overseas, the department or unit needs to make sure they create a genuine independent contractor arrangement. If a department or unit enters into an agreement with an individual overseas and calls that individual an independent contractor, but then structures the relationship in such a way that the individual is being treated more like an employee, there could be very serious implications for the university.

In the US, if an individual is misclassified as an independent contractor and is later determined by a US court or agency to be a *de facto* employee, the employer could face liability with respect to tax withholdings, social security, workers compensation insurance, overtime, and benefits, and may also have to pay interest and penalties.

**Outside the US, the risks become much greater.** Employment laws in other countries often require the employer to also pay back vacation and holidays, bonuses, large severance amounts, large fines, and even reinstate the individual as an employee. In some countries, there are even criminal penalties. Such a ruling that an individual is a *de facto* employee could also cause the employer to be held to have a taxable presence in the country, meaning the employer (i.e., the university) would have to file a local tax return and pay taxes on the income derived from the services provided in the country.

You can reduce the risk of such a misclassification by taking steps upfront to modify the arrangement so that the university has less control over the worker’s performance of the services and so that the university is treating the worker less like an employee.

For example:

- Give the individual freedom to set his own schedule and working hours
- Require the individual to use his own office and supplies
- Pay the individual on a project basis, rather than hourly, weekly, monthly, etc.
- Engage an individual who has other clients for which he or she does similar work
- Engage the individual only on a temporary / short-term basis
- Engage a company who can have one of its employees perform the work
- Do not reimburse business expenses such as travel