



Revised Independent Contractor Policy

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Agenda

- Context for Policy Review and Revision
- Key New Elements
- Policy Overview
- Responsibilities for Compliance
- Use of the Independent Contractor Questionnaire (ICQ)
- Three-Part Legal Test
- Record Retention
- Next Steps
- Contacts
- Pop Quiz



Context for Policy Review and Revision

- Independent Contractor Policy was last updated in 2010
- January 2016 – class action lawsuit filed by massage therapists at HUHS
 - Discovery revealed variations across Harvard in IC classification procedures and practices
 - Existing IC policy focuses on federal law rather than the more restrictive Massachusetts test
 - Degree of risk is potentially substantial across University given high number of IC engagements (~20,000-30,000 IC's since 2013)
- September 2017 - Working group comprised of OGC, HHR, HR, Finance, RMAS and Operations formed to
 - Review current state and identify challenges and gaps
 - Revise policy to state more clearly the legal requirements under Massachusetts and federal law
 - Revise policy to provide better guidance to managers and HR in making correct IC classifications
 - Develop business process that is realistic and does not impose undue burden on IC engagements that are low risk
 - Develop training materials for implementation of revised policy



Context for Policy Review and Revision

- March 2018 – class action lawsuit was settled. Under the terms of the Settlement
 - Approximately 20 massage therapists and acupuncturists were reclassified as employees
 - University affirms its commitment to properly classify workers who provide services to the University
 - University will review and revise current IC policy to
 - Reflect both Massachusetts and U.S. law
 - Support managers and HR staff in making correct classifications
- Working Group revised IC Policy statement and Independent Contractor Questionnaire (ICQ) and related materials
- Revised Policy vetted with the Financial Policy and Review Committee (FPRC), HR Deans & Directors and incorporated feedback – October & November 2018
- Updated Financial Deans, Financial Managers Forum (FMF), and University Risk Management Council (URMC) – November 2018 to February 2019



Key New Elements

- Effective date of Revised Policy – July 1, 2019 (Early Adoption)
- Revised Policy clearly sets forth legal test for appropriate IC classification
- Mandates that review and approval of IC classification must occur *before* IC is retained, any services are rendered, and/or payment made
- Clarifies roles and responsibilities for local hiring department or unit, HR and accounts payable approvers; specifies required documentation, review process, and approval steps needed before any services are performed
- Clarifies that compliance is the obligation of the local department or unit
- Revised ICQ reflects Massachusetts law and is easier to complete and analyze
- Identifies lower risk engagements as exceptions to ICQ requirement (but must still comply with the law).



Policy Overview

Policy Statement

- Presumption of employee status unless 3-part Massachusetts IC test is met
- A worker or department's preference **is not relevant** to the classification determination.
- All proposed IC engagements must be reviewed and approved as set forth in the Policy before engaging an individual
- Services cannot be rendered until an ICQ has been completed and approved and a contract signed

Reasons for the Policy

- Harvard must comply with Massachusetts and federal law
 - Wage and hour requirements (including overtime)
 - Tax withholding requirements (income tax, social security and Medicare)
 - Workers compensation, unemployment and other benefits



Policy Overview

Risks if Schools or Units Fail to Comply

- Financial liability - including taxes, workers' compensation, unemployment benefits as well as fees and fines assessed by both the federal and the state which must be paid by the hiring department
- Civil and criminal liability – willful violations can incur fines or imprisonment
- Reputational liability
- Other risks

Who Must Comply

- All Harvard University schools, tubs, local units, Affiliate Institutions (e.g., Harvard Global, Wyss Institute, etc.), Allied Institutions (e.g., HUP, Arnold Arboretum, etc.) and University-wide Initiatives must comply. Harvard-affiliated Hospitals are not considered affiliate institutions.



Responsibilities for Compliance

Local Hiring Department or Unit

- Determine if the IC Policy applies and initiate any required procedures, including completion of ICQ
- Obtain proper review and approval before contract is signed and before any services are performed

Local HR Office

- Review proposed IC engagements, including signing ICQ, and approve engagement as IC if three-part test is satisfied
- Ensure that departments are familiar with, and receive training regarding, IC policy requirements

Local Department or Unit's Accounts Payable Approver

- Ensure that required documentation that supports IC classification is completed before a vendor is created in AP system or payment issued (signed contract, approved ICQ or written statement of why not required, and an invoice)

Individual schools and units may have more restrictive policies or internal processes; contact your tub human resources or finance department for more information.

See [IC Process Workflow](#)



Three-Part Legal Test Requirements

- Under Massachusetts law, every individual receiving payment for services to the University is **considered to be an employee** of the University unless all of the factors in the 3-part Massachusetts legal IC test are satisfied
 - Massachusetts IC test is among most restrictive – more restrictive than IRS test with the familiar “20 questions” analysis
- The Massachusetts IC 3-part test (all 3 prongs must be met)
 - Part 1: The worker must be free from Harvard’s control and direction in connection with the performance of the service, both under a contract for the performance of the service and in fact
 - Part 2: The service performed by the worker must be outside the usual course of Harvard’s business, and not a regular and continuous part of business operations
 - Part 3: The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same type as the service being performed for Harvard

Mass. Gen. Laws Ch. 149, sec. 148B



Part 1: Free from Harvard's Control and Direction

- The worker must be free from Harvard's control and direction in connection with the performance of the service, both under a contract for the performance of the service and in fact
 - Duties are carried out with minimal instruction/training from Harvard – IC has independent control and direction over the work
 - Individual performs functions using an approach of their own choosing
 - Individual sets their own hours
 - Determines the appropriate tools and methods to use
 - Uses their own materials and supplies
 - Determines when and where to work (within general parameters)
 - Individual determines how much work is needed to perform the project for which they have been retained
 - Some indicia - Individual is being paid a flat fee by the job or project rather than an hourly rate



Part 2: Outside Usual Course of Business

- The service performed by the worker must be outside the usual course of the employer's business
 - The service performed by the individual must be incidental to the operations of the School, local unit, or department rather than a necessary or integrated component of operations
 - Are the services a necessary or integrated component of operations?
 - Does this unit typically use Harvard employees to perform these services?
 - Will the individual supervise Harvard employees?
 - This assessment should consider whether the service is a regular and continuing part of the operations of the School, local unit, or department engaging the worker
 - Duration of engagement a significant factor - Longer engagements (e.g. that exceed 6 months) are more likely to fail this prong of the test, because the services performed may be more likely to be part of the regular and continuing operations of the School, local unit, or department.
 - Whether the services will be provided over an open-ended period of time, rather than a discrete or defined period.



Part 3: Established Trade

- The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same type as the service being performed for Harvard
 - Individual must be operating an independent business enterprise which offers its services to other clients or customers
 - Individual must be capable of performing the services for other entities and should not be solely dependent on Harvard for work
 - Fact that work is performed off-site not relevant – test is whether individual is regularly engaged in offering such services to others
 - Projects that require individual to devote a substantial majority of their working time to Harvard, precluding work for others, should be limited in duration
 - Some indicia - website, business email address, business card, business tax ID number



When to Complete an Independent Contractor Questionnaire (ICQ)

- An independent contractor questionnaire (ICQ) must be completed regardless of where the work is being completed (including those performing work inside and outside of Massachusetts) and prior to engaging the individual to start work.
 - For work outside of the U.S., *Harvard must follow the rules and regulations based on the country in which the work is taking place.* These provisions may be different than MA law and are occasionally more stringent (Europe) or entail tax withholdings on payments to contractors. The local school or unit's HR office can work with Global Support Services (GSS) to determine international IC status.
- An ICQ is required for the following engaged to perform a service for Harvard
 - An individual engaged to perform a service for Harvard (but see exceptions)
 - Single-Employee Limited Liability Company (LLC), Unincorporated or Incorporated Company
 - An ICQ is required when a company is a single-employee company (even if it subcontracts additional workers)
 - Third-Party Entity that Act as Freelancer Marketplace (W2 no ICQ)
 - If the third-party entity does not go through a formal classification process but rather acts as a freelancer marketplace (an intermediary which advertises and coordinates individuals selling their services such as freelancer.com or TaskRabbit) an ICQ must be completed



IC Questionnaire Exceptions Process

- Under limited circumstances, the formal completion of an IC Questionnaire is not required
 - The local department or unit must still confirm that the classification satisfies the three-part legal test
 - A written contract is still required
 - The local department or unit must provide the accounts payable approver with a written exception attestation form or statement of why a completed IC Questionnaire is not required
- Guest Speaker or Guest Lecturer receiving an honorarium or speaking fee for a one-time speaking engagement (performers/musicians also fall into this category)
 - An honorarium is a payment provided as a token of appreciation for participation in an activity or event, rather than payment as a contractual obligation for services rendered
 - This exception cannot be used for individuals teaching or co-teaching a substantial portion of a course, those listed as instructors in the course catalog, or those who hold a Harvard appointment for their teaching role



IC Questionnaire Exceptions Process

- Single, Short-Term Engagements for Less than \$3,000 - An IC Questionnaire is not required if
 - the engagement must satisfy the three-part IC test;
 - the engagement will last no longer than three months (90 calendar days); AND
 - total payments to the IC will not exceed \$3,000.
- Note - If the local department or unit renews, extends, or enters into a subsequent engagement with the IC within a 12-month period, then then a completed ICQ is required.
- Note - Individual schools and units may have more restrictive exception processes; check with your tub human resources or finance office for more information.



Where Policy Does Not Apply and an ICQ is not Required

- The Policy does not apply and an ICQ is not required for the following performing services for Harvard
 - Suppliers/vendors with more than one employee whose personnel are classified as employees (e.g., Cambridge Landscaping, Randstad)
 - Human Subject Payments (See [Human Subject Payments Policy](#))
 - When the University is contracting with a third-party entity (e.g., managed services provider, temp agency, payrolling service, IT staffing firm) to obtain personnel who are classified by those firms as employees or contractors to perform services
 - Schools and departments enrolled in the [Contingent Workforce Managed Services Program](#) (Fieldglass/Yoh) or who use the suppliers managed in the Yoh Managed Service Program meet the IC classification requirements of a managed services provider



If an Individual is Classified as an IC – Local Hiring Department

Completing Contract

- Follow local school or unit requirements around contracts and the contract review process. Be sure that any IC contract contains the following language: **[Consultant/Contractor/Vendor] shall be an independent contractor, free from Harvard’s direction and control, and not an agent or employee of Harvard.**
- The Office of the General Counsel has model contracts available [here](#). Strategic Procurement (SP) has additional master service agreement templates as well as a contract checklist which may be found on their [internal website](#).
- Be sure to follow any additional requirements which may apply based on funding source or contract threshold. For example, the use of debarment language with federal funds or bid requirements based on purchasing procedure dollar thresholds. See [Procurement Policy](#) or [Procure to Pay Manual](#).
- Be sure to note in the contract or communicate to ICs the requirement that they follow Harvard Policy for any travel or out-of-pocket reimbursements, as well as requirements related to the Massachusetts [Performers Tax](#) and tax withholding for nonresident aliens (i.e., foreign nationals) for work completed inside of the U.S. See [Performer Tax Information](#).
- Based on the type of service, location of service and individuals tax residency status, additional taxes may be withheld.



Once Work has been Completed – Local Hiring Department & Approvers

- After the work has been completed to the hiring department or unit's satisfaction, the IC must submit an itemized invoice to the school or unit for processing. Purchasers and preparers should confirm that the required documentation has been completed (ICQ and contract) and review the invoice following the Responsibilities of Purchasers, Preparers and Approvers (ROPPA) policy.
- Payment through HCOM is the only acceptable method of payment for independent contractors. Harvard must not pay for IC services via out-of-pocket or by using a Harvard Corporate Card or PCard
- Collect required documentation to set individual up as a vendor
- Review and prepare invoice for payment
 - Invoices should be itemized
 - Be sure to note if work was completed within or outside the U.S.
 - Use the appropriate object code based on the services completed
 - Use object codes 8690 or 8692 for ICs who earn income connected with performances (i.e., speakers, presenters, charges related to a performance [actors, musicians, directors, production crew, sound, light, stage workers], athletes, etc.). See Performers Tax for additional information.
 - Other professional services are generally processed within the M784 object code range though other object codes may also be appropriate



Once Work has Been Completed - Approvers

- Accounts Payable Approver Responsibilities
 - When submitting the invoice for approval, the hiring department or unit must have completed the required documentation listed below and the approver is responsible for ensuring that the required documentation has been completed before any payment is issued
- Required Documentation
 - A completed questionnaire (ICQ), signed by HR, approving the classification of the individual as an IC or the IC Questionnaire Exception Attestation Form or language that confirms the contractor meets IC Policy Exceptions
 - The completed ICQ may be submitted with the invoice or evidenced in some other way. Some schools or units may use [Conga-Novatus](#) as an ICQ and contract management tool or have other internal processes for tracking that the ICQ has been completed
 - A completed and signed contract. Some schools or units may use [Conga-Novatus](#) as a contract management tool or have other internal processes for tracking approved contracts
 - An itemized invoice
- Approvers must review the documentation and invoice following the [Responsibilities of Purchasers, Preparers and Approvers](#) (ROPPA) policy.
- If the approver does not receive or have evidence of the above required documentation, the payment cannot be processed.



RECORD RETENTION

- Follow University's General Records Schedule
 - Contracts, RFPs, ICQs and related materials should be retained for six years after final payment
 - Invoices must be retained 4 years after the end of the fiscal year for nonsponsored or, for sponsored, 7 years after the final project account closing unless a longer period is specified by the sponsor



Next Steps

- Resources
 - Trainings for HR, department administrators and financial approvers, and hiring managers to be available on the Training Portal
 - Developing On-Line Training to be available in the Training Portal ICQ is a fillable PDF
 - Developing FAQs – including hypotheticals and examples Sample “attestation” form when an ICQ exception applies
 - Chart showing options to process payments for those that do not meet the IC test and are classified as employees
 - IC classification flowchart and other additional materials and reference tools.
 - Materials can be found at the [Financial Policy](#) website or [Human Resources Policies](#) website
- Down the road
 - Explore opportunities to take advantage the new Buy-to-Pay system to educate suppliers and hiring departments and possibly establish “gates” to payment process.
 - Develop an audit plan



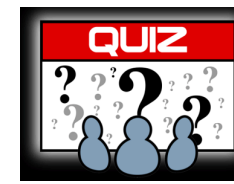
CONTACTS

- **Questions around the ICQ and Classification Process:**
 - Local Human Resources Office
 - Office of Labor & Employee Relations
- **Legal Guidance**
 - Contract templates, guidance and a contract checklist may be found on the Strategic Procurement or Office of General Counsel's website.
 - OGC can also offer additional legal guidance if needed.
- **Global Support Services**
 - Guidance if work to be performed outside of US
- **Policy Guidance**
 - Financial Policy Office (financialpolicy@Harvard.edu)
 - Office of Labor & Employee Relations





Pop Quiz



Q: Do I need to do an ICQ if the individual is already set up as a vendor?

A: Yes, an ICQ is based on the specific work instance and must be completed every time an independent contractor applies for work or there are changes in their scope of work.

Q: If an individual is already classified as an independent contractor, do they have to go through the independent contractor approval process each time they apply for a new contract?

A: Yes, the taxing authorities look at each beginning and ending work period as a separate contract performed by an individual. They require full documentation for each separate contract. Caution: The taxing authorities will regard an ongoing working relationship with an individual as an employee and not an IC even if the work is intermittent.

Q: I want to hire an individual for a one-time job and payment is less than \$3,000, do I need to go through the same independent contractor review process as I would for an amount above \$3,000?

A: Not completely. If the individual meets the three-part test for an IC, the ICQ is not required if it is a one-time engagement, the payment will not exceed \$3,000 and the contract period is less than 3 months (90 days). However, an exception attestation form must be submitted with the payment in order to show the school has done their due diligence in following the IC Policy.



Pop Quiz



Q: A department is unable to find sufficient Teaching Assistants (TA) for a three-week summer course. When this occurs, the visiting instructor will offer a TA slot to a researcher or PhD candidate at their home institution (often outside of the U.S.). Is this an employee or IC? Does this qualify as an exception due to the short duration (3-weeks) of the work and the individual will earn less than \$3,000?

A: While placing these individuals on a payroll is difficult due to the short duration of their appointment, this is a payroll transaction. The individual is performing a service that is a regular part of the school or unit's business.

Q: I have several independent contractors who work intermittently throughout the year. Can I create a contract that is based on the entire year for each of them in order to capture all work performed during that year?

A: No, contracts must be limited to each contract period and scope of work to be completed. Any later or additional work must go through a separate independent contractor process. If an individual is working on a regular basis, their classification may be that of employee.

Additional Resources

[Business Expense Reimbursements Policy](#)

[Conga-Novatus Contract Management Tool](#)

[Contingent Workforce Project](#)

[Honoraria and Reimbursements for Foreign Nationals](#)

[Human Subject Payments](#)

[Independent Contractor Policy](#) – including ICQ, flow-charts and additional materials (to be uploaded early March)

[OGC Model Documents](#)

[Out of State Payrolls](#) (see also Contingent Workforce Project)

[Performer Tax Information](#)

[Policy Subrecipient vs Contractor Guidance](#)

[Procure to Pay Manual](#)

[Procurement Policy](#)

[Record Retention Schedule](#)

[Responsibilities of Purchases, Preparers, and Approvers](#) (ROPPA)

[Strategic Procurement Contract Information](#)

[Travel Policy](#)



Appendices

[Exception Attestation Form](#)

[IC Process Workflow](#)

[IC Process for Guest Speakers or Lecturers](#)





Independent Contractor Questionnaire Exception Attestation Form

If one of the below requirements for exemption are met, completion of an Independent Contractor Questionnaire (ICQ) is not required. A written contract is still required and must be completed.

In addition, this form or other documentation attesting to the below must be completed and attached to the payment request upon submission to your approver.

Exempt from the ICQ Requirement:

- One-time, short-term engagement that meets all of the following criteria:
 - A. Meets all three ICQ criteria below (see [IC Policy](#); if not certain, complete the [ICQ Questionnaire](#)).
 - 1. The worker must be free from Harvard's control and direction in connection with the performance of the service, both under a contract for the performance of the service and in fact.
 - AND
 - 2. The service performed by the worker must be outside the usual course of Harvard's business.
 - AND
 - 3. The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same type as the service being performed for Harvard.
 - AND
 - C. Total payments to the IC will not exceed \$3,000 in a calendar year, AND
 - D. Period of work is less than 90 calendar days.

- Guest Speaker or Guest Lecturer
An ICQ is not required when hosting a guest speaker or guest lecturer receiving an honorarium or speaking fee for a one-time speaking engagement. (An honorarium is a payment provided as a token of appreciation for participation in an activity or event, rather than payment as a contractual obligation for services rendered.)

Name of Worker/IC (Individual or Entity): _____

Brief Project Service/Description: _____

Project Start Date: _____ Project End Date: _____

Total Amount to be Paid: _____

Attestation:

I have read the exemptions above and certify that the engagement of services by the designated worker satisfy one of the above exemptions necessary to designate the service provider as an independent contractor/consultant.

Signature: _____ School or Dept: _____

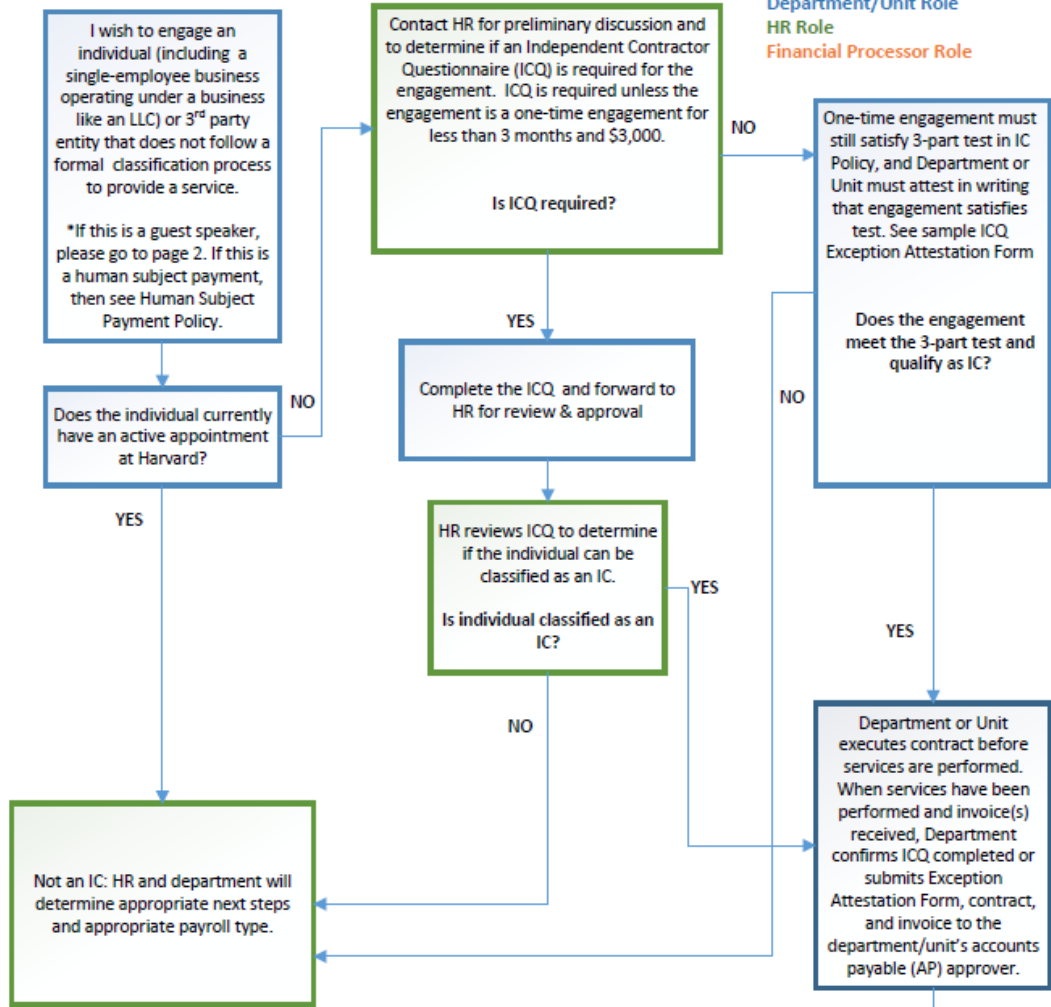
Print Name: _____ Date: _____



Independent Contract (IC) Process

REV: 04/01/2019

Department/Unit Role
HR Role
Financial Processor Role



Payment Process
 (see App. C – Finance & Approval Process for additional information).

- If the IC will need system access to resources, review the Policy on Person of Interest (POI) to set the them up (POI).
- Payments must be processed through the AP system; services cannot be paid out-of-pocket, or by using a University Corporate or PCard.
- Department reviews invoices and receipts for appropriateness and per the contract agreement.
- Use the appropriate object code when processing payments.

AP approvers must make sure an ICQ or attestation, and contract have been completed and signed before processing payments. Both the ICQ and contract must be kept on file.

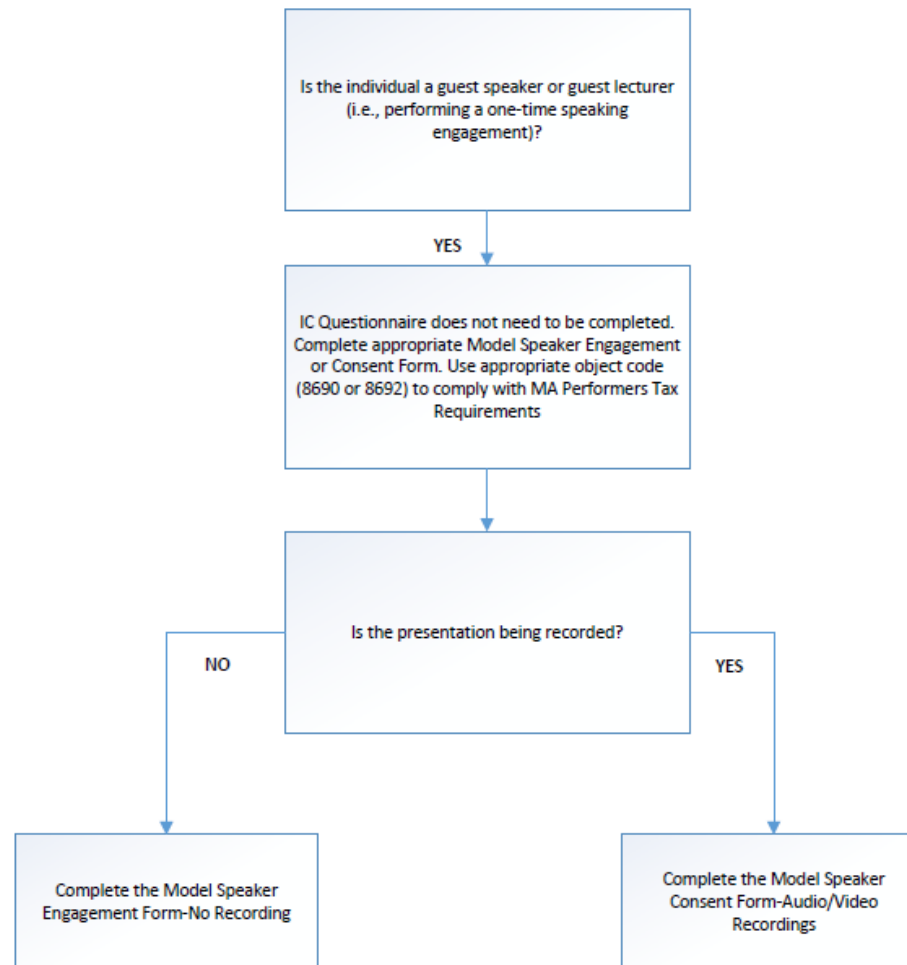
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HARVARD
 Financial Administration
 Human Resources Labor & Employee Relations

Independent Contractor (IC) Process for Guest Speakers or Lecturers*

Rev: 04/01/2019



*Guest speakers and lecturers do not require an ICQ when the payment is an honorarium provided as a token of appreciation (thank you) for participation in an activity or event where no fee is legally required and not as a contractual obligation to pay for services rendered. If the speaker determines or negotiates the payment amount, schools and units must follow the IC Policy or ICQ Exception Attestation Process. Be sure a foreign individual's visa status allows payments prior to offering an honoraria.

Examples would be a nominal payment and not required on an on-going basis and include:

- One-time lecture - Any individual teaching or co-teaching a substantial portion of a course, listed as an instructor in the course catalog or who holds a Harvard appointment cannot be classified as an IC.
- Guest speaker at an educational event, workshop, conference or other similar function.
- Panelist for a workshop or conference.
- Performing artist (though these are more commonly payment for services and must follow the IC Policy or ICQ Exception Attestation Process).

