



**Independent Contractors (IC)
@ Kent State University**

***Rationale, Process and
Procedures***

***Presented by:
The Division of Business and Finance
The Office of General Counsel
The Division of Human Resources***

November 2013

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- II. Goals/Purpose of the Independent Contractor (IC) Workshop**
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 - B. OPERS PEDACKN Form**
 - C. Questions**

I. Facilitator Introductions

- Mr. Michael Pfahl, *Associate University Counsel, Office of the General Counsel*
- Ms. Paula DiVencenzo, *Tax Manager, Business & Finance*
- Mr. Alvin Evans, *Associate Vice President, Human Resources*
- Mrs. Emily Hermon, *Manager, Accounts Payable*

II. Goals/Purpose of the Independent Contractor (IC) Workshop

- Education and updates about the laws that guide the university's approach
- Awareness as to the risks associated with IC relationships
- Awareness regarding the tax implications associated with classifications
- Outline of the financial implications for misclassifications
- Understanding of the responsibilities of the online process for IC forms
- Questions and answers

III. Laws Governing the IC

- A. Purpose
- B. Practice
- C. Impact
- D. Agreements
- E. Questions

A. Purpose

The decision of whether a person is an employee or an independent contractor involves considerations of

- University policy (6-04.3)
- the IRS Code (20-factor test)
- NLRB decisions (National Labor Relations Act Section 2, Part 3.
- Fair Labor Standards Act
- U.S. Court of Appeals for the Sixth Circuit test (common law analysis)
- and other state and federal employment-related regulations.
- The University has one opportunity to get the classification right before the relationship begins.

In 2010, Congress took measures to enact the Employee Misclassification Prevention Act (EMPA) which would make misclassification a Federal Labor Law Violation punishable by fines from \$1,100 to \$5,000 per employee, per violation.

- Since then, Millions upon Millions in fines have been levied...and paid.
- Sullivan University fined -\$483,000.00

B. Practice

- **Intent.** The parties' intent is pertinent to the test for independent contractor status. However, such intent is not controlling on the issue of independent contractor status. (*United Ins. Co. of America v. N.L.R.B.*, 304 F.2d 86 (7th Cir. 1962).
- **Common Law Test.** Our federal circuit, the Sixth Circuit uses the “common law” test for determining whether a person is an independent contractor or employee.” the common law analysis requires the consideration of numerous factors, including: 1) the hiring party's right to control the manner and means by which the product is accomplished; 2) the skill required by the hired party; 3) the duration of the relationship between the parties; the hiring party's right to assign additional projects; the hired party's discretion over when and how to work; 4) the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the hiring party's regular business; 5) the hired party's employee benefits; and tax treatment of the hired party's compensation.

20 Common Law Factors (IRS Rev. Ruling 87-41)

1. Instructions
2. Training
3. Integration
4. Services rendered personally
5. Hiring, supervising and paying assistants
6. Continuing relationship
7. Set hours of work
8. Full time required
9. Work done on premises
10. Order or sequence set
11. Oral or written reports
12. Payments by hour, week or month
13. Payment of expenses
14. Furnishing of tools and materials
15. Significant investment
16. Profit or loss
17. Working for more than one firm at a time
18. Making services available to the general public
19. Right to discharge
20. Right to terminate

C. Impact

- Every office is responsible.
- Classification can affect the person's ability to seek damages against the university for accidents and issues arising during the course of the relationships (worker's compensation, compensatory damages, etc.)
- **Key consideration:** "Regardless of whether someone is labeled an independent contractor, when the hiring party retains the 'right to control the manner or means' by which a particular job is completed, it may be said that the hired party is actually an employee or agent who is acting 'on behalf of' the hiring party." *Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1988), cited in *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp.2d 668 (S.D. Ohio 2009).
- **OPERS.** Change in law allows independent contractors to seek redress if they believe they were misclassified.

D. Agreements

- **Employment Agreements:** Created by the University and available from the Division of Human Resources. Creates an employment relationship.
- **Independent Contractor Agreement:** Should be created in some format by the independent contractor. Should describe “Deliverables” and “Schedules” and should not have any mention of a “salary.” Terms common in creating an independent contractor relationship:
 - Indemnification of university
 - Contractor uses own tools and controls own work
 - Contractor is responsible for all taxes
 - Contractor is not entitled to benefits (leave, health, tuition etc.)
 - University can terminate at any time or with 30 days notice



E. Questions

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IV. Tax Perspective

- A. Independent Contractor vs. Employee vs. Entity
- B. IRS Update
- C. Documentation and Support
- D. Tax Tips
- E. Questions

A. Independent Contractor vs. Employee vs. Entity

Independent Contractor determination required for:

- Individual
- Sole Proprietor
- DBA's
- Disregarded single member LLC's
- any payee whose income is reported on Form 1040

Independent Contractor determination not required for:

- Corporations
- Partnerships
- Multimember LLC's
- Single member LLC's electing to be treated as a corporation for tax purposes

The use of an employer identification number DOES NOT prove independent contractor

Must ask or Request a W-9

Contract determines who the payee is, not what is on the invoice

B. IRS Update

2011 Memo of understanding- IRS-Dept. of Labor-States “teaming up”

IRS Audit plan – 6,000 audits in 2010, 2011, 2012 – Awaiting results

Self-Audit

3 Control Tests – Behavioral control, financial control, and relationship of the parties

Dual capacity doctrine – Not an employee and an independent contractor in same year

C. Documentation and Support

- Provide WHO – WHAT – WHY – WHERE – HOW
- DO NOT treat independent contractors or contingent workers like employees
- DO NOT USE “salary”, “work”, “compensate”
- USE Contract, payment, fee, service agreement
- Use Guest Speaker instead of teacher – where temporary and where professor is still present – Guest lecturer, expert presentation, etc.
- Acknowledge the intent of the relationship and waive any right to company-sponsored health and retirement benefits in the contract.
- Show responsibilities for an employee differ from those of an independent contractor. A change in classification status should be accompanied by a change in duties and relationship. The amount of control exercised over the work performed is a key factor.
- Agree to paying a fixed fee plus charges for unreimbursed expenses for travel, meals, lodging. Invoice the amounts instead of paying directly or reimbursing separately from the fees for service.
- Do not have the right to determine and do not determine how the work shall be done.
- Show the individual has an on going business with other clients (yellow pages not a resume or VITA).

D. Tax Tips in the IC Approval Process – What are we looking for?

Provide a brief description of the work to be performed.

Be specific

HELPFUL: Joe will perform as a soloist on Friday, May 10, 2014 at Spring Commencement. Ceremony.

NOT specific enough: render services as required under NSF Grant “NIFL Basic Skills”

Better: Moderate the Math and Numeracy Discussion list. Includes monitoring all posts, suggests topics for discussion, keeps discussion active, locates experts guest moderators, and reports all activity to project coordinator on a quarterly basis.

Is the work vital? YES = sign of employment

Focus on whether the work is the regular business of the University

Remember that a service can be desirable, necessary, or even essential to a business and still be an independent contractor.

Are they key to the success or continuation of the business?

Faculty are vital.

Guest instructor for a week is not.

Building construction is required but that’s not an educational service.

Musicians for student groups are regular and desired but education can still occur without them.

D. Tax Tips in the IC Approval Process – What are we looking for?

Provide a summary of qualifications of the individual

- This looks at Behavioral Control
 - Do not attach a resume or VITAE – looks like an employee
 - Highly trained professionals may require less training and instruction and because of a specialized skill, may have other clients.
 - Mention other clients and showing the individual is experienced as an independent contractor
- How will the individual be paid?
- Fixed fee is best. Lump sum when the project is complete.
 - Agree on a payment schedule which typically businesses bill once a month or after meeting targets as stated in the agreement.
 - Equal payments on a weekly, bi-weekly, or bi-monthly basis look like payroll

D. Tax Tips in the IC Approval Process – What are we looking for?

Can the individual terminate the relationship without liability?

Employees usually give a notice and often can leave without finishing projects without being able to be sued.

Contractor agreement should address the consequences if the job is not finished.

Explain why the department believes the individual is an independent contractor.

Provide any other information to support the contractor – USE the control tests.

Avoid “the individual engaged to perform services for the university is not an employee of the of university.”

Explain why the person is not an employee using the 20 factors or 3 control tests

Don’t confuse long term relationship with indefinite.

Long term contracts or contracts renewed regularly due to superior service, competitive costs, or lack of alternate service providers can be IC

How will the individual be reimbursed for travel and/or business expense?

IC – Negotiated cost reimbursements as part of contracted price. Contractor will invoice for service fee plus an amount to cover travel, meals, and lodging.

Direct payment of the business and traveling expenses looks more like an employment relationship.

Avoid answering this questions with “As agreed to per the unsigned agreement”

In determining financial control, focus on the unreimbursed expenses. Does the contractor have rent and utilities? Tools and Equipment? Advertising? Employ own workers? Employee benefits?

Insurance? Repairs and maintenance, leasing of equipment, licensing/certification /professional dues, postage/delivery, inventory, depreciation?



E. Questions

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V. New Features to the Independent Contractor Determination Form

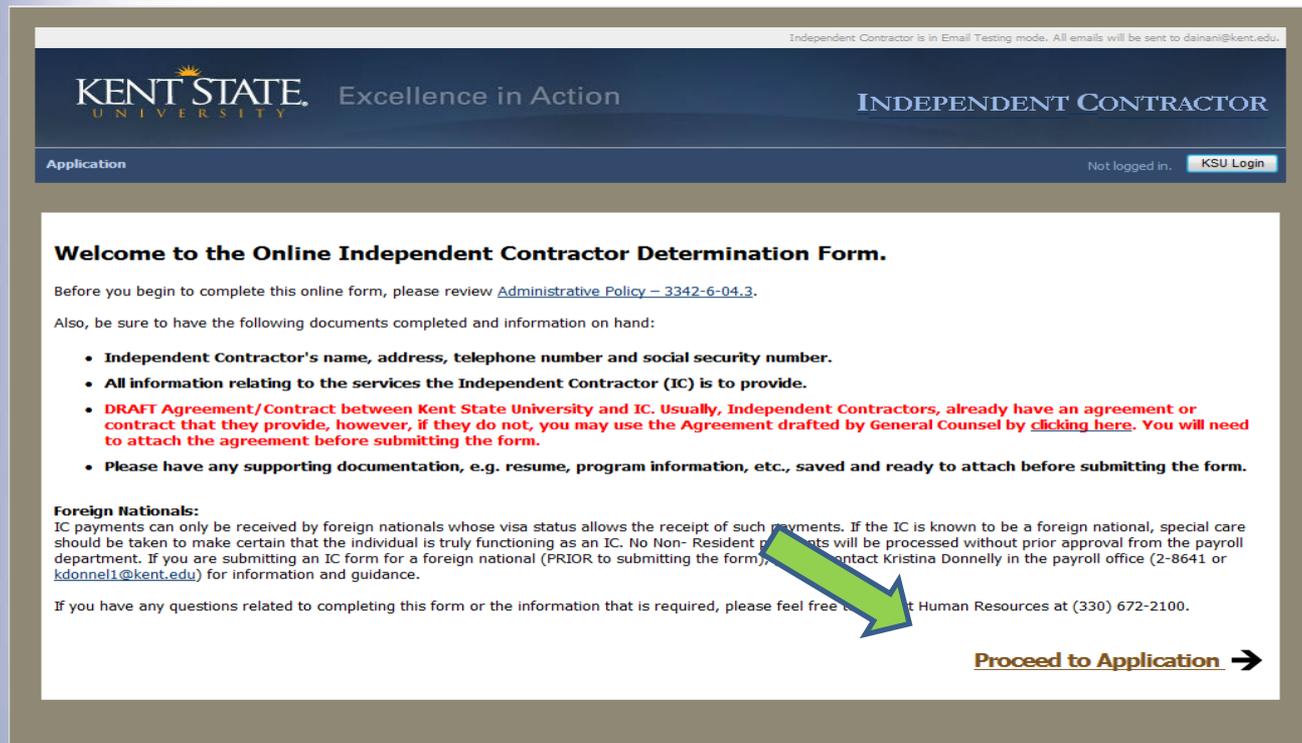
- A. Process
- B. Step-by-step
- C. Questions

A. Process

The Online ICDF is to be used by University departments to submit a request for an Independent Contractor to work at the University. This form gives information to Human Resources to complete a review to be sure that the individual being requested to perform independently contracted work is not a University employee, nor will be performing any duties that a University employee would normally be performing.

A. Process (con't)

Below is the landing page for the Online ICDF located at <https://solutions.kent.edu/IndependentContractor/> or on the HR home page. This page is to give you information on what is needed to complete the ICDF, as well as provide the University's Independent Contractor Policy. When you are ready to complete the ICDF, click on the "Proceed to Application" link at the bottom right corner of the page.



Independent Contractor is in Email Testing mode. All emails will be sent to dainani@kent.edu.

KENT STATE UNIVERSITY Excellence in Action INDEPENDENT CONTRACTOR

Application Not logged in. [KSU Login](#)

Welcome to the Online Independent Contractor Determination Form.

Before you begin to complete this online form, please review [Administrative Policy – 3342-6-04.3](#).

Also, be sure to have the following documents completed and information on hand:

- Independent Contractor's name, address, telephone number and social security number.
- All information relating to the services the Independent Contractor (IC) is to provide.
- **DRAFT Agreement/Contract between Kent State University and IC. Usually, Independent Contractors, already have an agreement or contract that they provide, however, if they do not, you may use the Agreement drafted by General Counsel by [clicking here](#). You will need to attach the agreement before submitting the form.**
- Please have any supporting documentation, e.g. resume, program information, etc., saved and ready to attach before submitting the form.

Foreign Nationals:
IC payments can only be received by foreign nationals whose visa status allows the receipt of such payments. If the IC is known to be a foreign national, special care should be taken to make certain that the individual is truly functioning as an IC. No Non-Resident payments will be processed without prior approval from the payroll department. If you are submitting an IC form for a foreign national (PRIOR to submitting the form), please contact Kristina Donnelly in the payroll office (2-8641 or kdonnell1@kent.edu) for information and guidance.

If you have any questions related to completing this form or the information that is required, please feel free to contact Human Resources at (330) 672-2100.

[Proceed to Application](#) →

A. Process (con't)

We now require a KSU login to complete the form.

Independent Contractor is in Email Testing mode. All emails will be sent to dainani@kent.edu.

KENT STATE UNIVERSITY Excellence in Action

INDEPENDENT CONTRACTOR

Instructions Application Not logged in. [KSU Login](#)

Log In:

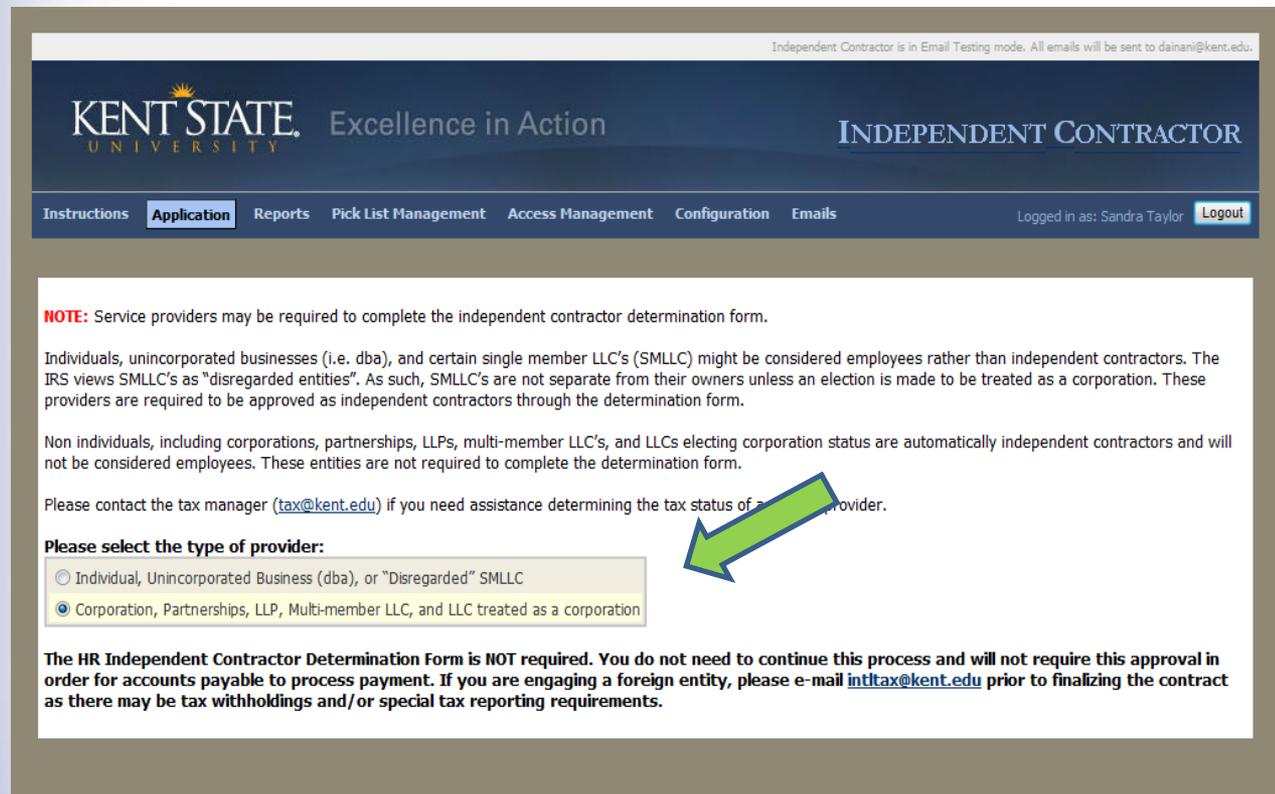
Flashline ID: @kent.edu

Password:



A. Process (con't)

Added to the process is to “Please select the type of provider:” If “Individual, Unincorporated Business (dba), or “Disregarded” SMLLC” is selected then the process will continue. If “Corporation, Partnerships, LLP, Multi-member LLC, and LLC treated as a corporation” is selected then the HR Independent Contractor Determination Form is NOT required.



Independent Contractor is in Email Testing mode. All emails will be sent to dainani@kent.edu.

KENT STATE UNIVERSITY Excellence in Action INDEPENDENT CONTRACTOR

Instructions **Application** Reports Pick List Management Access Management Configuration Emails Logged in as: Sandra Taylor [Logout](#)

NOTE: Service providers may be required to complete the independent contractor determination form.

Individuals, unincorporated businesses (i.e. dba), and certain single member LLC's (SMLLC) might be considered employees rather than independent contractors. The IRS views SMLLC's as "disregarded entities". As such, SMLLC's are not separate from their owners unless an election is made to be treated as a corporation. These providers are required to be approved as independent contractors through the determination form.

Non individuals, including corporations, partnerships, LLPs, multi-member LLC's, and LLCs electing corporation status are automatically independent contractors and will not be considered employees. These entities are not required to complete the determination form.

Please contact the tax manager (tax@kent.edu) if you need assistance determining the tax status of a provider.

Please select the type of provider:

Individual, Unincorporated Business (dba), or "Disregarded" SMLLC

Corporation, Partnerships, LLP, Multi-member LLC, and LLC treated as a corporation

The HR Independent Contractor Determination Form is NOT required. You do not need to continue this process and will not require this approval in order for accounts payable to process payment. If you are engaging a foreign entity, please e-mail inttax@kent.edu prior to finalizing the contract as there may be tax withholdings and/or special tax reporting requirements.

A. Process (con't)

Other added features:

1. “Individual’s Date of Birth” – Must be at least 18 years of age
2. Independent Contractor’s email address
3. “Individual’s Resident Status”
4. “Is this individual a relative or business associate of a KSU employee?”

REQUESTING DEPARTMENT INFORMATION

*The individual completing the form must fill in all required information as indicated by the asterisk *.*

Campus *	-----Select One-----	Requesting Department *	-----Select One-----
Name of Person Completing Form *		Email of Person Completing Form *	
Phone Number of Person Completing Form *		Fax Number of Person Completing Form *	

HIRING AUTHORITY

If the person completing this form is the hiring authority [click here](#) to duplicate the above information, else please complete the following with the hiring authority's information.

Name of Hiring Authority *		Hiring Authority's Email Address *	
Hiring Authority's Phone Number *		Hiring Authority's Fax Number *	

INDIVIDUAL TO PERFORM SERVICES INFORMATION

Name of Individual to Perform Service *		United States Social Security Number of Individual to Perform Services *	
Individual's Date of Birth *		Telephone Number of Individual to Perform Services *	
Individual's Resident Status *	<input type="radio"/> US Citizen <input type="radio"/> Permanent Resident <input type="radio"/> Non US Citizen	Individual's Email *	
Full Address of Individual to Perform Service *			
Is this individual a current KSU employee/student employee? *	<input type="radio"/> Yes <input type="radio"/> No		
Has this individual been a KSU employee/student employee within the past 12 months? *	<input type="radio"/> Yes <input type="radio"/> No		
Is this individual a relative or business associate of a KSU employee? *	<input checked="" type="radio"/> Yes <input type="radio"/> No		
If yes, list relative or business associate's name *			
Has this individual been an Independent Contractor at KSU in your department within the past 6 months? *	<input type="radio"/> Yes <input type="radio"/> No		
Anticipated Start Date *		Anticipated End Date *	

A. Process (con't)

Provide a brief description of the work to be performed* :

Provide a summary of the qualifications of the individual* :

What will the individual do with the finished product* (i.e., do they return it to the university, sell it or keep it?):

Has this service already been performed, prior to completion of this form? * : Yes No

Is the individual's work vital to the university's core business? * : Yes No

Is training by the university necessary for the individual to perform tasks in a specific way? * : Yes No

Will it be necessary for this individual to receive on-going supervision? * : Yes No

Who is the individual required to contact if any problems or complaints arise and who is responsible for the resolution? *

Will the individual receive extensive instruction on how the work is to be performed? * : Yes No

Will the department schedule how, when or where to do the work? * : Yes No

Will the work be performed in a KSU department or facility? * : Yes No

Where will services be performed? Indicate city, state, and if not within the United States – country* :

Will the individual be required to submit regular reports, either written or oral? * : Yes No

Will the individual be provided with any university tools, materials or equipment? * : Yes No

Other added features:

5. “Where will services be performed? Indicate city, state, and if not within the United States – country”



A. Process (con't)

Will the individual be required to submit regular reports, either written or oral? * : Yes No

Will the individual be provided with any university tools, materials or equipment? * : Yes No

What is the expected amount of payment? * : \$

How will the individual be paid? * :

- Lump sum when project is complete
- Other
- Scheduled per the unsigned agreement

How will the individual be reimbursed for travel and/or business expenses? * :

- As agreed to per the unsigned agreement
- Department will arrange and pay for the travel directly through their budget or grant funds
- Reimbursement receipts
- Other

Can the individual terminate the relationship without liability? * : Yes No

Is this request part of a grant-funded project? * : Yes No

Is there a draft or an unsigned written agreement available? * : Yes No

Upload the draft or unsigned written agreement at the end of this form. The independent contractor should be able to provide the department with this draft or unsigned written agreement. If not, then a draft written agreement may be downloaded from the HR Forms Library by clicking on the Miscellaneous link, Complete the required information and submit an unsigned copy with this form.

Explain why the department believes the individual is an independent contractor * :

SUPPORTING AND/OR REQUIRED DOCUMENTATION

Please upload all supporting documents and/or the draft unsigned written agreement as required by the University's Administrative Policy [3342-6-04.3\(D\)\(2 and 3\)](#).

File Name: No file selected. (only word, excel or pdf files)

Other added features:

6. “What is the expected amount of payment?”

Reminder:

Please upload a draft unsigned written agreement as required by the University Administrative Policy 3342-6-04.3(D)(2 and 3)

B. Step-by-step

1. Gathering data prior to the online submittal
2. Knowing your contractor
3. Submitting BEFORE an IC engagement occurs
4. Getting a signed agreement after HR approval



C. Questions

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VI. Accounts Payable

- A. Payments to Independent Contractors
- B. OPERS PEDACKN Form
- C. Questions

A. Payments to Independent Contractors

Once the services have been rendered, submit the following paperwork to Accounts Payable:

- Completed and signed check request form
- Copy of the HR Independent Contractor Form email
- Copy of fully signed contract (or Independent Contractor Terms of Agreement)
- OPERS PEDACKN form

B. OPERS PEDACKN Form

- PEDACKN – Independent Contractor Acknowledgment Form
- Required under State of Ohio Senate Bill 343 Sec. 145.038 , which is a pension reform bill passed in late 2012.
- Must be signed and dated within 30 days of the contractor's start of service.

C. Questions

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Manager

Accounts Payable

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Accounts Payable Specialist

Accounts Payable

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