



GUIDELINES FOR CLASSIFICATION OF WORKERS

- **Employees**
- **Volunteers**
- **Independent Contractors**

***Prepared for St. Norbert College
Administration and Supervisory Staff***

August 2017

Prepared for St. Norbert College by:
Attorney Greg Grobe
Law Firm of Conway, Olejniczak & Jerry, S.C.
231 S. Adams Street
Green Bay, WI 54301

Revised by SNC Human Resources March 2019

TABLE OF CONTENTS

OVERVIEW	3
Classifications of Individuals Who Provide Services to St. Norbert.	3
Legal Risks Associated with Misclassifications.	4
Other Forms of Payments.	4
EMPLOYEES	4
Exempt and Non-exempt Classifications.	4
Full-Time, Part-Time, Short-time and Temporary Classifications.	5
VOLUNTEERS	5
Criteria for Volunteers.	5
Volunteer Agreement.	6
INDEPENDENT CONTRACTORS	7
Criteria for Independent Contractor Classification.	7
Independent Contractor Agreements.	8
CLOSING	9
PROCESS	9

1. OVERVIEW

The purpose of this Guide is to assist St. Norbert supervisors in understanding the various legal classifications which can be applied to individuals who provide services to the College (excluding individuals supplying services through a subcontract or vendor supply agreement), the legal rules applicable to the classifications, the legal risks associated with misclassification, and the current criteria for each classification. Information and contracts are available on the [Human Resources website](#).

Because the applicable rules and judicial interpretations frequently change in this area of the law, supervisors should be aware that this Guide will be amended periodically, and they should always check with Human Resources to verify that the most current criteria and forms are being used.

It is the goal of St. Norbert College to improve its classifications of individuals providing services to the College so as to minimize risk, increase consistency among departments, and ensure that proper documentation exists to satisfy legal requirements. St. Norbert also strives to provide helpful tools for its supervisors in the form of education and training (such as the information in this Guide) and in the form of sample contracts and other forms.

A. Classifications of Individuals Who Provide Services to St. Norbert.

There are many types of individuals who work or provide services to St. Norbert College. Some of these may receive some form of compensation, payment or other benefit from the College, some of these may not receive anything. Some may be tracking their hours, some may not. Some may provide services for extended periods of time, some may provide only brief services, sometimes for a day or less. Some may have signed agreements or other documents that memorialized the terms of their relationship, some may not have.

There are generally only 4 possible classifications of individuals who are providing services to the College. The first are employees of other businesses who have subcontracted with the College to provide goods or services. This group of individuals is not covered by this Guide.

The second classification is **employee**. This classification should cover the vast majority of individuals who provide services to the College. This is the least risky of the four classifications (although there are some risks relating to internal classifications within the general employee classification). In situations of doubt, the default decision should be to classify the individual as an employee. When classified as an employee, the employee must receive at least minimum wage for their time, and, unless they meet a legal exemption category, must track all of their work time and must be paid overtime for all hours over 40 worked in a workweek.

The third classification is **volunteer**. These are individuals who provide services without any expectation of payment.

The fourth classification is an **independent contractor**. These are individuals who work for money, but whose services are such that they qualify as an independent business person, thus avoiding the need for tracking of time or payment of overtime or minimum wage.

Because all of the classifications other than employee involve situations where no wages are being paid to the individual, those classifications carry significant legal risks to the College, and potentially also to supervisors personally, so great care must be taken to ensure that the legal criteria is satisfied before the classification is finalized.

B. Legal Risks Associated with Misclassifications.

Wage and hour and worker misclassification legal claims are among the fastest growing lawsuits in the country. Violations of the state and federal laws governing classifications can lead to significant financial exposures to the College. In addition, supervisors and others involved in classification decisions can face personal legal exposures under some of the laws.

Due to the growing legal threats associated with misclassifications, it is critical that St. Norbert supervisors pay close attention to the criteria for classifications and work closely with Human Resources to resolve any questions associated with the classification. It is also imperative that the proper forms and agreements be used to document the relationships.

The list of individuals who provide services to the College are subject to audit to ensure that they are properly classified.

C. Other Forms of Payments.

Individuals classified as employees must receive weekly wages meeting minimum wage requirements along with overtime pay for those who do not meet exemptions. Independent contractors must receive payments (not wages) as outlined in their contracts. Volunteers are not entitled to any payments, and the provision of pay in the form of gifts, honorariums, recognition awards, or incentives can be a risky practice and can undermine their classifications as volunteers (as explained below).

Some College departments have authorized the use of payments referred to a “stipends” to various individuals providing services to the College. Stipends appear to have been used for various purposes – sometimes they are alleged to constitute wages, other times gifts to volunteers, and other times they are simply undefined. The continued use of “stipends” is a practice that is discouraged unless the payment is clarified in relation to the classification of the person receiving it. The person authorizing the stipend must clarify whether it is wages (in which case tax withholdings must apply and the stipend must satisfy minimum wage requirements) or for other purposes, in which case there must be an analysis of whether the stipend creates legal risk in relation to the classification of the person receiving it.

II. EMPLOYEES

As noted above, the default classification for all individuals providing services to the College should be employee. Those who are not classified as an employee must meet the criteria for one of the other classifications in this Guide.

Employees also must be classified for purposes of federal and state wage hour and medical coverage laws, as well as for internal St. Norbert College requirements.

A. Exempt and Non-exempt Classifications.

All employees must either be classified as exempt or non-exempt from state and federal overtime requirements. The default classification is that the employee is non-exempt. If an employee is improperly classified as exempt, and no overtime pay is made for hours which should have been paid, it will create a significant financial risk to the College.

The principal exemptions applicable to St. Norbert are: Executives, Administrators and Professionals (including Computer Professionals). By way of example, St. Norbert College’s faculty are classified as exempt under the Professional exemption. Some members of the Academic Administrative staff are exempt under the Administrative exemption.

Each exemption category has very specific criteria relating to the types of duties performed by the individual, as well as the minimum salary which must be paid, which must be satisfied before the employee may be classified as exempt from overtime. The job descriptions for an exempt position must clearly reflect duties which fall within the exemption, and the actual duties performed by an exempt employee must mirror the exempt duties within the job descriptions.

Supervisors will assist Human Resources in assigning exempt/non-exempt classifications and Human Resources will periodically audit exemption classifications and job descriptions for compliance with state and federal laws.

B. Full-Time, Part-Time, Short-time and Temporary Classifications.

In addition to the exemption classification, all employees will be listed as full-time, part-time, short-time or temporary. Such classifications are critical to ensure compliance with the Affordable Care Act and St. Norbert's internal benefit plans. Supervisors must closely monitor hours of non-full time employees to ensure that they are not regularly working beyond their stated hours.

III. VOLUNTEERS

St. Norbert College is blessed by many individuals who are willing to voluntarily assist the College in connection with a variety of programs and events, and in a variety of capacities, without any expectation of pay, college credit, or advancement of their personal careers. These may include current faculty, administrative staff or other employees who take on different roles than their normal jobs. These may also include former employees, families of employees, students, friends of students or employees, or members of the surrounding community. Many of these individuals may contribute significant hours of service to the College and may be essential for the success of the applicable program or event. These individuals have no expectation of any form of compensation for their services, although in some cases some form of nominal financial or non-financial gifts may have been provided in recognition of their efforts and their value to the College.

Historically, for legal purposes, these individuals have been classified as volunteers, and therefore exempt from minimum wage, overtime, recordkeeping, unemployment, workers' compensation and other employment laws. Unfortunately, like other non-employee classifications, courts and government agencies have increasingly scrutinized and narrowed eligibility for the volunteer classification, making it increasingly difficult to meet the legal elements for the exemption. This, in turn, has increased the legal risks to St. Norbert in connection with such classifications. For this reason, it is critical that great care should be taken to be sure that an individual meets the legal requirements for a volunteer classification.

A. Criteria for Volunteers.

The fact that an individual wishes to be classified as a volunteer is not sufficient to satisfy the legal elements. There are multiple criteria that must be satisfied, including the following:

1. **Nature of Services.** The services provided by the individual must be charitable in nature or of a type commonly associated with volunteer work.

2. **No Promise of Payment or Other Benefits.** There must be no promise, direct, indirect or implied, that the individual will receive any form of payment or benefit of any kind in exchange for their services.
3. **Gifts to Volunteers Must Not Exceed Nominal Value.** If, after the services have been provided, a gift (including honorariums) is offered to acknowledge the individual's volunteer effort, then the gift must not suggest that the individual is getting paid for their services, and there must be no suggestion that the individual was induced to provide their services in anticipation of receiving a recognition gift. Any recognition gift, if offered, must not exceed a \$50 value AND the value cannot be tied to productivity or hours worked.
4. **No Expectation of Future Benefits.** The individual must not have any expectation of future benefits from their volunteer services.
5. **Activity Must Be Less Than Full Time.** The services provided by the individual must not be a full-time position or occupation.
6. **Must Not Displace Regular Employees.** The services provided by the individual must not be provided as a substitution or supplementation of services provided by St. Norbert employees. Generally, individuals providing volunteer services should not be performing services identical to those being provided by St. Norbert employees.
7. **Must be No Pressure to Volunteer.** There must be no express or implied pressure or coercion for the individual to volunteer their services.
8. **Current Employees Must Not Be Performing Same Duties When Volunteering.** If the individual is an existing St. Norbert employee, then they cannot be performing the same services they perform as an employee when they are volunteering. For example, an individual employed as an accountant at St. Norbert cannot volunteer to perform accounting services.

If a particular individual does not meet all of the above criteria, then contact the St. Norbert Human Resources department to review the situation to determine whether any options exist for the volunteer opportunity. In addition to the above legal criteria, all volunteers must also comply with the following:

9. **Submit to [Background Check](#).** For safety and security purposes, all volunteers on campus may be required to submit to a background check depending on the services provided.
10. **Compliance With St. Norbert Policies.** Volunteers are also expected to comply at all times with the St. Norbert Mission Statement and with the applicable general personal conduct rules and expectations of the College. Any violations by any volunteer should be immediately reported to a St. Norbert College supervisor.

B. [Volunteer Agreement](#).

If the background check report is acceptable and all legal criteria met, the individual must sign a Volunteer Agreement. No changes are to be made in the Volunteer Agreement without approval from Human Resources. Signed copies should be provided to the individual and Human Resources. *(NOTE: For legal compliance purposes, St. Norbert College requires all*

volunteers to complete the volunteer form to confirm that they are freely offering their services as a volunteer).

IV. INDEPENDENT CONTRACTORS

Another non-employee classification is an independent contractor. Independent contractors are not eligible for minimum wages, not eligible for overtime, not eligible for College benefits, and their payments are not subject to payroll taxes or other withholdings.

Because of the potential cost savings associated with hiring independent contractors, many businesses abuse the classifications and ignore the strict legal criteria required to classify an individual as an independent contractor. Because of this, state and federal governments, the Internal Revenue Service, the Wisconsin Department of Revenue, the Wisconsin Unemployment and Workers' Compensation Divisions, and state and federal courts have been cracking down on independent contractor misclassifications, and have been enacting new and narrower criteria which must be satisfied before such classifications will be honored. Lawsuits involving misclassified independent contractors remain a significant legal risk to employers, and the numbers of such lawsuits have been dramatically increasing in recent years.

A. Criteria for Independent Contractor Classification.

One of the reasons why classifications of independent contractors is risky is because there is no universal set of legal criteria. Each state and federal law contains its own set of criteria, and satisfying the criteria for one set of laws does not ensure other laws will be satisfied. In addition, the criteria have been changing very rapidly in recent years. The Department of Labor, for example, issued several new guidelines in 2015 which significantly changed the factors that will be reviewed in connection with an independent contractor classification. The following are examples of independent contractor criteria from the newest Department of Labor guidance:

1. **Whether work performed is an integral part of the employer's business.** If the services being performed by the worker are the same type of services performed by the business to the public, it is more likely that the worker is an employee. For example, a carpenter hired by a construction company would be performing a function "integral" to the business, whereas a software developer hired to create bid-tracking software for the construction company would not be doing an "integral" function. Work can be integral even if it is only one part of an employer's business, if the work is performed offsite (e.g., telework and flexible work schedules), and/or if it is also performed by hundreds of other individuals. Another factor is whether the worker is or would be displacing work performed or previously performed by employees. If so, then it would be an indication of employee status.
2. **Worker's managerial skills impacting their opportunity for profit or loss.** The Dept. of Labor factors analyze what steps the worker must take to create a profit or loss for himself. If the worker must make decisions on whether to hire help, which tools and materials to purchase, how to market and advertise, where to rent space and how to manage time tables, it may indicate an independent business/contractor status. If the ability to earn a profit is primarily tied to the opportunity for additional hours or more work to earn more, or to the quality of work performed, it is not indicative of independent contractor status. The key question is whether managerial skills, not basic work skills, are required in order to make a profit or suffer a loss.

3. **Relative investments by worker and employer.** The Department of Labor factors also analyze whether the worker has made an investment in their business beyond the particular job and the nature of the investment of the worker in their business. Investing solely in equipment and tools tied to a particular job is insufficient to demonstrate the existence of an independent business, particularly if not significant in comparison with the employer's investment in the business.
4. **Specialized skills and initiative.** The factors that distinguish between a worker's "technical skills," which do not necessarily provide evidence of an independent business, and their "business skills, judgment, and initiative," which may reflect the operation of a separate business, the latter being determinative of independence. For example, a highly skilled carpenter who works for several contractors because of his or her experience and knowledge may not reflect independent contractor status because the skills, though important, are not exercised with independent judgment. On the other hand, a specialized custom handcrafted cabinet maker, who markets his or her services, determines which orders to fill, orders materials and decides how much to order, and makes similar business-related decisions is evidence of a specialized skill or initiative.
5. **Duration of worker's relationship.** A worker employed for long periods of time, or for a permanent or indefinite duration, is more likely an employee than an independent contractor. Even periods of a few weeks or months may, depending on the type of service, be more reflective of an employment relationship than an independent business. An independent contractor generally does not work continuously for the same employer but takes ad hoc jobs or assignments.
6. **Nature and degree of control by the employer.** The issue of "control" should primarily examine how economically dependent the worker is on the employer. If the worker is primarily reliant on work from the employer, even if work is performed for other businesses, it is an indication of employee status and reflects that the employer has ultimate "control" from the viewpoint of "economic realities." Less important is who has day-to-day decision making authority over the aspects of the job and how, when, or where it is performed. For example, flexibility over the hours to be worked does not necessarily reflect an independent business, nor does the issue of where the work is performed.

St. Norbert has developed a [Questionnaire](#) to be used as a tool for analyzing whether an individual has the potential to meet the independent contractor criteria. If an individual fails to meet the strict requirements of an independent contractor, then they must be classified as an employee, receive proper wages (minimum wage/overtime), must track their hours and must be subject to tax withholdings.

B. Independent Contractor Agreements.

St. Norbert has developed several types of independent contractor agreements for various categories of independent contractors. If a supervisor is hiring a short-term speaker, performer, translator, or interpreter they can complete the "supervisor short-term contract" found on the [Human Resources website](#). When a supervisor is hiring a short-term worker other than a speaker, performer, translator, or interpreter or they would like assistance in determining worker classification they should complete the [Questionnaire](#) and Human

Resources will assist in determining the appropriate classification. All long-term independent contractors require completion of the [Questionnaire](#).

V. CLOSING

The legal exposures to the College associated with classifications of workers is a growing threat. As such, supervisors must take great care to understand the legal criteria for the classifications and work with our Human Resource department and other resources to ensure legal compliance.

This Guide is designed to offer assistance in making those decisions. The information within this guide, and the forms and agreements will doubtlessly change from time to time, so be sure to use the most recent information and forms available. Again, Human Resources can assist with that task.

All individuals providing services to the College must be classified as an employee, volunteer or an independent contractor. If the individual is not classified as an employee, they must clearly meet the legal requirements of an alternate classification and sign an agreement acknowledging that they are not an employee and are classified under one of the exceptions.

All employees must track their hours and receive at least minimum wage and overtime pay for all hours over 40 in a work week (unless a particular overtime exemption applies).

Questions on any of the above classifications or sample forms should be directed to Human Resources.

VI. PROCESS

For clarification on the process, please read the [Independent Contractor Procedures](#) and call Human Resources with any questions.