

Commonwealth of Virginia
Department of Human Resource Management

Guidance

Talent Acquisition

Introduction

Each of the Commonwealth's agencies has duties and responsibilities which it must perform. An agency head is charged with accomplishing them. Because they are usually greater than one person can accomplish, an agency head usually has the authority to employ staff or to contract for services. As agency heads consider employing and contracting, they must think in terms of the knowledge, skills, abilities, competencies, and other personal characteristics, that those employed or contracted must possess in order to competently perform the work assigned to them. Those characteristics are referred to collectively as "talent."

This document provides a brief overview of the options available when acquiring talent. It is concerned with obtaining, or acquiring, talent from outside the agency. In the case of employment, acquiring talent means bringing it inside the agency from a source outside the agency. The persons, who possess the needed talent, become employees of the agency. Attachment A, "Employment with the Commonwealth of Virginia," describes various mechanisms and dimensions of employment. In the case of contracting, the talent remains outside the agency but provides services to the agency. Attachment A also speaks of contracting related to talent acquisition. Whether employed or contracted, the talent is acquired at a cost. In the case of employment the costs have the form of salaries, wages, and benefits paid to or granted to the employees. In the case of contracts the costs are in the form of fees.

There are several mechanisms for acquiring talent. The choice of the appropriate mechanism usually depends on assessing certain characteristics associated with the situation that requires the talent. The characteristics of the situation to be assessed include:

- Presence
- Timeliness
- Permanence
- Availability
- Relatedness
- Compensation
- Administration
- Fees

A description of each appears below.

Characteristics Assessed

Presence – Is the talent present in the agency? The first step in determining if talent should be acquired is to determine if it is already present in the volume (i.e. the number of employees possessing the talent) and level needed to accomplish the new concern. If employees possess the talent, but not at the level needed, then one should ask how long it might take to develop the talent in the present employees.

Timeliness – How long will it take to develop the talent within current employees or to acquire it from external sources given the approaches allowed for employing or contracting the talent? Which approaches to acquiring or developing talent will deliver it in time to meet the schedule to fulfill the new concern? The timeliness characteristic may invoke a multiphase approach in which immediate needs are met by acquiring talent from external sources while extended needs are met by developing present employees.

Permanence – Will the talent be needed into the distant future? Will the specific persons acquired be needed into the distant future? If the talent is needed into the distant future, is the need continuous or cyclical? Does the need arise because of volume or level? If there is continuous need due to volume, then the need is for staff additions versus staff augmentation. If there is continuous need for level, without increase in volume, then the need is for staff development, which may follow an initial period of staff augmentation. If there is cyclical need due to volume, there may be need for a continuing relation for cyclical staff augmentation. If the need for level cycles, then there may be need for either staff development or for continuous relations for cyclical augmentation.

Availability – How available is the talent? Is it relatively abundant in the labor market? Is it relatively rare and only available on an occasional basis? If it is rare, what cost premiums is it worth? If it is rare and in general demand, what arrangements must be made to retain those internal staff who have the talent, especially if the agency bore the cost of developing their talent? If the talent is readily available and needed only temporarily, then wage employment is a viable course. If the talent is not generally available, then it may need to be supplied through a contact arrangement that includes premium costs (e.g. vendors overhead).

Relatedness – Is the talent needed to accomplish the agency's core duties and responsibilities? If the talent is not needed for core services and is a long term need, then can it be acquired more efficiently through outsourcing – either to another state agency or to the private sector? Payroll services have been successfully outsourced by one agency to another. The Department of Accounts operates a Payroll Services Bureau specifically for this purpose. Housekeeping services have been contracted to the private sector on occasions where it was economically prudent to do so. There may be occasions when an agency might outsource some aspect of its core services. The primary reason for such action would be economic efficiency.

Compensation – What is paid to people for their work and the talent it requires? These costs include not only salary or wages, but benefits as well. Costs will always include

certain mandated benefits, such as Social Security contributions. There has often been a tendency not to include costs for unemployment or workers' compensation (injury costs) when computing total labor costs. Such costs should be estimated and included if it is likely that they will be incurred. Some persons argue that contracting avoids the costs of benefits, but vendors of services must pay mandated benefits and may choose to pay other benefits. Benefit costs must then be included in their fees if they are to remain viable.

Administration – What other costs are incurred to acquire and maintain talent? State agencies often do not include the administrative costs incurred in order to hire and maintain employees. If there are only a few additions, their administrative burden can often be absorbed by existing capacity. If there are large numbers of new employees needed, additional staff may be needed to service them. Administrative costs also include the costs of recruiting employees and their replacements. Training costs are also administrative costs. The cost of payroll staff is an administrative cost, as is the cost of human resources staff. All physical overhead costs, such as space, furniture, and equipment, may be included as administrative costs. Vendors of services also incur these costs and must include them in their fees to remain viable.

Fees – What will a vendor of services charge for the contracted work? The charges will include the vendor's cost for compensation (salary, wages, benefits), administration (all overhead), and profit.

Decision Flow

The characteristics above may be considered in any of several sequences according to an agency's concerns and priorities. One such sequence is considered below to illustrate the process an agency might use in determining how it might decide the question of talent acquisition.

Initiation

1. Presence – Does the agency already possess the necessary volumes and levels of talent to accomplish the new concern, or can it be developed timely within existing staff?

If **yes**, then there is no need for talent acquisition. Institute a plan to accomplish the concern with existing staff.

If **no**, then go to step 2, Permanence, immediately below.

2. Permanence – Will the talent be needed into the distant future (e.g. more than five years)?

If **no**, then a staff augmentation approach may be needed. Go to "Staff Augmentation," below.

If **yes**, then a staff addition approach may be needed. Go to “Staff Addition,” below.

Staff Augmentation

1. Permanence – Will the need be for more than one year?

If **yes**, then consider using restricted positions and restricted appointments.

[Comment: The time-limited nature of appointments must be made known to potential employees. Restricted positions are associated with funds of a prescribed duration. The termination date on the position reflects the cessation of funds.]

Can the restricted position be accommodated within the allotted position level?

If **yes**, then go to the next question below.

If **no**, then go to #2, Availability, immediately below.

Can the restricted appointment be made timely?

If **yes**, then continue considering the restricted appointment mechanism.

[Comment: the restricted appointment mechanism is very much like the usual salaried appointment mechanism. The time-limited nature of the appointment is made known.]

If **no**, then go to #2, Availability, immediately below.

If **no**, then go to #2, Availability, immediately below.

2. Availability – Is the talent readily available?

If **yes**, then consider hiring on a wage basis.

If **no**, then consider contracting – i.e. consider using the procurement system.

3. Economic Check – Conduct the “Economic Check,” see below.

Staff Addition

1. Timeliness – Can the talent be acquired through the usual hiring process in time to meet the concern? Addressing this question may require considering availability.

If **yes**, go to #2 immediately below, Relatedness.

If **no**,

- a) Consider staff augmentation for meeting initial staffing needs – Go to Staff Augmentation #2, Availability.
- b) Consider how to acquire permanent staff – Go to #2, Relatedness, immediately below.

2. Relatedness – Is the concern related to the agency’s core duties and responsibilities?

If **yes**, consider the usual hiring process for salaried staff and execute the Economic Check.

If **no**, consider outsourcing.

- a) Consider using another state agency for services.
- b) Consider using the private sector through the procurement process.
- c) Execute the Economic Check.

Economic Check – One or more initial determinations are checked against economic concerns.

1. Consider All Costs

- a) For Staff Additions, consider: compensation (salary, benefits), administration.
- b) For Staff Augmentation,
 - 1) Wage employment – Consider: compensation (wages, benefits), administration.
 - 2) Contract – Consider fees and administration of the contract by the agency.

[Comment: A calculator exists to help with these comparisons.]

- c) Consider other “costs” and “benefits” (beyond compensation, fees, administration), such as:

Loyalty – Worker’s commitment to the organization and willingness to continue with it.

Engagement – Worker’s commitment to the work.

Continuity – Lack of disruption in services, relatedness between past, present, and future efforts.

Ownership – Agency owns the results of the work.

Employment/Co-employment risks.

2. Compare Costs and Benefits

3. Validate Initial Decision or Re-assess Options

4. Plan Future Reviews – If staff augmentation lasts more than one year, there should be at least an annual review.

Attachment A

Employment with the Commonwealth of Virginia

Introduction

There are many dimensions to the employment relationship. Department of Human Resource Management (DHRM) Policy 2.20, Types of Employment, defines several of them. Other dimensions lie outside Policy 2.20, with some of them mentioned below.

Employment Types Defined by Policy 2.20

Classified vs. Unclassified

A classified employee occupies a position that is classified within DHRM's Career Groups – See Career Group Descriptions (CGDs) on the DHRM web site. These employees are paid a salary. Full-time classified employees receive the full package of employment benefits offered by the Commonwealth.

Covered vs. Non-Covered

Covered employees are covered by the Virginia Personnel Act. (VPA, Code of Virginia (COV) § 2.2-2900 et seq.) They are salaried employees occupying a classified position. All Executive Branch employees are covered, unless specifically exempted from the VPA by one of its sections, some other section of the COV, or by the Appropriation Act. Covered employees have access to the state's Grievance Procedure, administered by the Department of Employment Dispute Resolution (EDR). Examples of typical non-covered employees are university faculty who are salaried employees in the Executive Branch, but are specifically exempted by a section of the VPA.

Restricted vs. Non-Restricted

Employment in a position that has 10% or more of its funding from non-continuous or non-recurring sources, such as grants, donations, or contracts, is employment in a position that is restricted, or limited, to the period of funding. Employees in classified, restricted positions are normally covered employees. Their positions and their appointments have termination dates coincident with the end of the non-continuous funding. These dates are entered into the Personnel Management Information System (PMIS). Persons hired into restricted positions must be notified that their employment may terminate when the funding is scheduled to end. Persons so terminated may still receive Severance Benefits (DHRM Policy 1.57) and Layoff rights (DHRM Policy 1.30)

Probationary vs. Non-Probationary

Employees initially hired or re-hired into a classified position must serve a probationary period, normally 12 months (DHRM Policy 1.45). During this period the employee does not have access to the Grievance Procedure. Upon successful completion of the probationary period, the classified employment becomes non-probationary and the employee does have access to the Grievance Procedure.

Salaried vs. Wage

Salaried employment pays a fixed rate per pay period, usually semi-monthly, despite the fact that the number of work days in each period may vary. In order for this arrangement to work, there are provisions for paid holidays and paid leave of various kinds (e.g.: annual, sick, and administrative). Wage employment entails paying only for hours worked, without provisions for paid holidays and paid leave. Wage employees are also referred to as P-14 or WE-14 employees because of the forms used in the past to document their employment. Wage employees receive only mandated benefits (e.g.: Social Security, unpaid FMLA, Workers Compensation, Unemployment Compensation, USERRA). They do not receive the additional state benefits provided salaried employees (e.g.: paid leave, health insurance, group life insurance, state retirement, VSDP, military pay supplements).

Full-Time (F) vs. Quasi-Full-Time (Q) vs. Part-Time (P)

These terms are applied to the time status of salaried employees in the Personnel Management Information System (PMIS). Full-time employees work at least 40 hours per week. Quasi-full-time employees work at least 32 hours per week, but less than 40 hours per week, or work 100% per week, but only for 9 – 11 months of the year. Part-time employees work 20 or more hours per week, but less than 32 hours per week, or work less than 100% for only 9 – 11 months in a year. F and Q employees receive the employer's contribution toward health insurance from their state agency employers. P employees are eligible to purchase health insurance, but pay the entire cost. Q and P employees may have certain benefits, such as annual leave accruals, prorated according to the amount of time they work

Note that the dimensions above are used together, so one may speak of a salaried, classified, covered, restricted, probationary employee. But some aspects of the dimensions overlap, so, for instance, if one encounters a covered employee, one expects that employee to be classified.

Employment Types outside Policy 2.20

Permanent vs. Temporary

These terms are applied to salaried positions and employees in the Personnel Management Information System (PMIS) in order to denote the relative duration of positions and employees. "Permanent" and "temporary" apply to employment conditions that may exist for purposes unrelated to funding *per se*, with "temporary" applying to time-limited appointments for purposes such as staff coverage. Though the term, "temporary," may have had broad application in the past, it is no longer defined as a position or appointment type for the classified service. It continues to be used by universities and colleges where it should only apply to appointments that are not covered by the Virginia Personnel Act. Note that the terms "permanent" and "temporary" are similar to "non-restricted" and "restricted," but the latter terms apply to specific funding arrangements. However, "non-restricted" positions and employees are recorded in PMIS as "permanent" in their respective "Duration" code fields. Positions and employees with duration codes of "T" should also have Position and Appointment Expire Dates recorded in PMIS.

State Employment with a Contract

The great majority of state employees do not have an employment contract. Their employment expectations are stated in DHRM Policy 1.60, Standards of Conduct, and elsewhere, but none of these statements constitutes a contract. Some state employees, notably university faculty, however, do have employment contracts, stating certain terms and conditions of employment. State employees with a contract need to be distinguished from others who provide contracted services, but are not considered to be state employees, such as vendors of services.

Employment through the Commonwealth’s Procurement System

Persons who are not employees of the Commonwealth may perform work for the Commonwealth as volunteers or as vendors of services. When vendors of services are employed, there is usually a contract involved. The contract must be let in a manner that conforms to the Virginia Public Procurement Act (Code of Virginia, §§ 2.2-4300 – 2.2-4377) administered by the Division of Purchases and Supply of the Department of General Services (or, in the case of information technology services, by the Virginia Information Technologies Agency, VITA). Some dimensions of such procurement appear below.

Direct Contract vs. Third Party Contract

An agency may contract directly with the provider of the services, a vendor, whether the provider is an individual or a company (or other entity) who offers to perform the services. An agency may also contract through a third party, such as a temporary services firm or a general contractor, for the services of an individual or group of individuals, such as a subcontractor. When the contract is with a specific individual (who may, in turn, hire his own assistants), that person is referred to as an “independent contractor.”

Project Services vs. Personal Services

Vendor-provided services obtained through the procurement process may be for specific ends, as in a project for a specific accomplishment. They may also be for a body of services that the agency might normally expect its own employees to perform, personal services. Contracting a painter to paint a wall in an office would be an example of a project service. Contracting with a temporary services firm to provide office receptionists in order to cover for the vacation absences of the agency’s regular staff would be an example of a personal services contract. In the latter case the employees provided by the temporary services firm may be referred to as “leased employees.”

Potential Risk Associated with Contracting – Employment or Co-Employment

Contracting for personal services, even when accomplished through a third party, can involve the risk of the leased employee being considered an employee of the agency. The same risk may arise with independent contractors. If a leased employee or an independent contractor is considered to be an employee of the agency, then the agency may be liable for injuries occurring to or committed by the person whose services were procured. Similar liabilities may occur with regard to the Fair Labor Standards Act (FLSA) and the Internal Revenue Code. In these cases the agency may be liable for overtime payments or withholding and payroll taxes.

Unfortunately, there is no single test of employment. Each law may invoke its own definition of employment, which usually involves a multipoint test. See Attachments B – D for examples.

Summary

Many of the human resources dimensions that a manager may need to consider when obtaining services are discussed above. Additional sources of information are indicated. Managers with questions about this document should contact their agency's human resources office.

Attachment B

IRS Eleven-Factor Test Employee vs. Independent Contractor

An employer must generally withhold federal income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. An employer does not generally have to withhold or pay taxes on payments to independent contractors.

The relationship between the worker and the business must be examined to determine whether an individual is an employee or an independent contractor. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavior control, financial control, and the type of relationship of the parties. These facts are discussed below.

Behavior control. Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

1. Instructions that the business gives to the worker. An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work.

- When and where to do the work.
- What tools or equipment to use.
- What workers to hire or assist with the work.
- Where to purchase supplies and services.
- What work must be performed by a specified individual.
- What order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or, instead, has given up that right.

2. Training that the business gives to the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control. Facts that show whether the business has a right to control the business aspects of the worker's job include:

3. The extent to which the worker has unreimbursed business expenses.

Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their business.

4. The extent of the worker's investment. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

5. The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

6. How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.

7. The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or loss.

Type of relationship. Facts that show the parties' type of relationship include:

8. Written contracts describing the relationship the parties intended to create.

9. Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.

10. The permanency of the relationship. If you engage a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that your intent was to create an employer-employee relationship.

11. The extent to which services performed by the worker are a key aspect of the regular business of the company. If a worker provides services that are a

key aspect of your regular business activity, it is more likely that you will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

Source: Adapted from IRS Publication 15-A (January 2007).

Attachment C

Fair Labor Standards Act Economic Reality Test

Under the Fair Labor Standards Act (FLSA), a person is determined to be an employee according to an Economic Reality Test. If the person is an employee, then the employer must be sure that all the requirements of the FLSA are met.

The US Supreme Court has determined that an employee subject to the FLSA, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The Court has held that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. Rather, it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

Source: U. S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Fact Sheet #13, Employment Relationship Under the Fair Labor Standards Act (FLSA).

Attachment D

The Common Law Control Test

The traditional common law approach to determining employee status is the common law control test. This test was initially applied to determine whether an employer should be held responsible for the actions of its workers when they cause some injury to a third party. As new employment-related statutes were enacted, most courts continued to apply the common law approach. Courts have weighed and applied the factors of the common law control test in the following manner:

- the greater the *skill required to do the job*, the more likely the individual is an independent contractor;
- the fact that the individual *supplies his or her own tools and materials* suggests independent contractor status;
- *the longer the relationship*, the more likely that there is an employer/employee relationship;
- the fact that the person who pays for the work has the *right to assign additional projects* to the worker without additional compensation and without altering the terms of a contract indicates employee status -- an independent contractor relationship is generally contractual;
- the fact that the *employer determines the work schedule* suggests an employment relationship;
- an *individual who is paid by the hour or other time period* is more likely to be considered an employee, while payment by the job or project suggests independent contractor status;
- where the *employer hires, fires and pays the worker's assistants* (rather than the worker himself or herself), the worker will more likely be deemed an employee;
- an individual who works in a field that is *not the company's ordinary line of business* will be more likely to be found an independent contractor;
- the fact that a worker is *in business for himself or herself* and has all the appropriate licenses suggests independent contractor status;
- the fact that a worker receives *employee benefits* from the person who pays for the work suggests an employment relationship; and
- the fact that a worker is *treated as an employee for tax purposes* indicates an employment relationship.

The common law control test continues to be used in determining whether an employer should be held vicariously liable for the acts of its employees. Its application has expanded, although it is not generally used to determine employee status under anti-discrimination statutes.

Source: Society for Human Resource Management. "Independent Contractors and Employees." Noreen E. McDermott, Esq.

http://www.shrm.org/Publications/LegalReport/Pages/CMS_000986.aspx