There have been significant recent changes to Massachusetts law concerning independent contractors.

The new law defines an independent contractor quite narrowly. It is also significantly more limited than treatment of independent contractors under federal wage and tax laws. In short, the law presumes that every worker is an employee unless each and every one of the following three criteria apply:

1. **Freedom from Control.** A worker must be free of Northeastern University’s “control and direction.” There must be a written document which states this explicitly. However, the document itself is not enough to make a worker an independent contractor. An individual must perform his or her functions independently. Independent contractors perform their functions using an approach of their own choosing. They can determine when and where they work, and how much work is needed to perform the project for which they have been retained. In contrast, employees are subject to more control. For example, an employer determines the work methods and schedules of employees.

2. **Work Outside the Usual Scope of Employer's Business.** Independent contractors must provide services and/or perform functions which are outside the employer’s usual sphere of business. An individual who performs functions which typically are performed by employees will be considered a Northeastern University employee, not an independent contractor. For example, if the University retains an individual to perform management functions or data entry, that person could be characterized as an employee under Massachusetts law. Both of these functions fall within the normal scope of the University’s business.

3. **Independent Trade, Occupation or Business.** An independent contractor must hold him or herself out to the public as available to provide the same or similar services to a variety of employers. A true independent contractor has a financial investment in his/her contracting/consulting business. It is not enough merely to work outside an institution’s place of business to meet the criteria of having one’s own business. For example, the Attorney General’s advisory on this topic cites real estate

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1 The federal tax and wage requirements still also remain in effect.
brokers who work for a brokerage firm or office as an example of workers who are likely to be considered employees under the new law. In this example, one is not an independent contractor simply because one can conduct much of his or her work from home or from sites outside the office base.

The Attorney General’s office has stated that it considers these three factors as “rigid”. In a change from previous practice, the Attorney General will not be flexible when considering a proposed contractor relationship, and will not balance different factors such as the work functions and work environment in question on a case by case basis.

Please note that an employer’s failure to contribute to unemployment compensation insurance, provide worker’s compensation insurance, or withhold payroll taxes is irrelevant to the question of whether an individual is an independent contractor or an employee. In fact, if the Commonwealth determines that a contract actually was an employee, an employer could be ordered to pay retroactive taxes for benefits on the individual’s behalf.

The other penalties for non-compliance are significant, including but not limited to fines of up to $50,000, criminal penalties including imprisonment, and debarment from contracting work. The law also provides for individual liability.

The University consultant template has been updated. It is important that this contract only is used in appropriate circumstances, those which meet the criteria described above.

Please be reminded that the Office of University Counsel will offer a brown-bag lunch time seminar this summer on independent contractor and/or consultant relationships. If you would like to attend, please notify Karen Brown at x2157. The seminar is scheduled for Thursday, June 23, 2005 from 12:00 pm – 1:00 pm.

Should you have any questions or need information concerning a specific situation or any of the content of this advisory, please contact the Office of the University Counsel, 115 Churchill Hall, x2157.

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