



## Montana Teachers' Retirement System FACT SHEET: Establishing Independent Contractor Status with TRS

This Fact Sheet is intended to:

- Explain why a TRS employer must correctly identify an individual as either an employee or independent contractor (IC) when that individual performs work in a position reportable to TRS;
- Describe the process and analysis required to conclusively establish IC status; and
- Remind TRS employers of the requirement to report a TRS retiree working in a TRS-reportable position to TRS, *even if* the retiree has been validly identified as an independent contractor (IC). This requirement has been in TRS law since 2011.

Read this Fact Sheet carefully and follow all instructions provided on Page 4 to ensure all required information and documentation is submitted to TRS.

### Why is it Imperative to Correctly Identify Workers as Employees or ICs?

#### *Tax Qualification and Mandatory Participation Requirements*

TRS is a federally tax-qualified pension plan under Title 26, Section 401(a) of the Internal Revenue Code. Montana law requires TRS to maintain its tax-qualified status, as it confers substantial financial benefit to TRS members, employers, and Montana taxpayers. As a tax-qualified plan, TRS is allowed and required to provide retirement benefits to employees working in TRS-reportable positions<sup>1</sup> and to the beneficiaries of those employees.

TRS is a mandatory participation pension plan. An individual performing work in a position reportable to TRS must participate in TRS if that individual is validly determined to be an employee of a TRS employer. On the other hand, an individual performing work in a TRS-reportable position is not allowed to participate in TRS if that individual is validly determined to be an independent contractor.

TRS is required to ensure that the eligible employees of TRS employers participate in the retirement system and that ineligible workers, including ICs, do not. Failure to comply with this requirement could result in financial penalties for TRS or even the loss of its federally tax-qualified status. If that were to occur, member contributions would have to be made with after-tax dollars, reducing members' take-home pay, and member benefits would be taxed as income at the time of accrual, rather than after retirement when benefits are actually received.

#### *Plan Funding and Equitable Benefits*

TRS benefit payments are largely funded by investment earnings on the member and employer contributions remitted to the system over time. We understand employers and/or members may have individual interests in identifying their workers or themselves as ICs rather than as employees when working in positions reportable to TRS. However, any practice that improperly removes a position reportable to TRS as a contributing position reduces contributions to the retirement system, thereby adversely affecting the overall funding of the system.

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<sup>1</sup> See the TRS Fact Sheet, "Which Positions Are Reportable to TRS?" available at [trs.mt.gov](https://trs.mt.gov).

## Presumption of Employee Status

TRS law<sup>2</sup> states that an individual working in a position reportable to TRS on or after July 1, 2024 is **presumed to be an employee of the employer** unless and until the individual's status is conclusively established to be that of an IC. This means **the employer must report the individual to TRS as an active member or a working retiree** (as appropriate) until adequate documentation that clearly establishes IC status has been provided to TRS.

- **Note:** This requirement also applies to individuals who performed the same work and were reported to TRS as ICs prior to July 1, 2024.

## What Analysis and Documentation Does TRS Require to Establish IC Status?

To overcome the presumption of an employer-employee relationship and to conclusively establish that an individual working in a TRS-reportable position is an IC rather than a common law employee, **the TRS employer must provide one of the following to TRS:**

- A completed **TRS Form 148, *Determination of Independent Contractor Status***, including Page 2 (certification of determination) completed and signed by a qualified analyst (i.e., an attorney, an employment or human resources professional, or other individual qualified to make worker status determinations), or
- an order of a court of competent jurisdiction; or
- an IRS Form SS-8 determination.

## What Must a Qualified Analyst's Determination Include?

**The qualified analyst must apply Internal Revenue Service criteria** in determining worker status.

For purposes of pension plan participation, the IRS applies common law principles to determine worker status. Applicable criteria for TRS purposes are described in [IRS Publication 963](#), Federal-State Reference Guide. Chapter 4 of that guide addresses issues pertaining to determination of worker status for individuals hired by governmental entities and instrumentalities.

Specifically, the qualified analyst must apply the Behavioral Control, Financial Control, and Relationship of the Parties criteria in IRS Publication 963, including all subsections of each, and the analyst's determination should:

- identify each IRS criterion, including each subsection;
- describe the facts and circumstances of the specific worker's service in the specific position as relate to that criterion;
- provide a reasoned explanation as to whether the analysis under that criterion weighs in favor of employee or IC status; and
- provide a reasoned final determination whether that the worker's status is that of an IC, based on the analysis of all criteria.

**Employer responsible for costs.** Any costs incurred to conclusively establish the IC status of an individual working in a position reportable to the retirement system are the sole responsibility of the employer.

**Copy of ICEC required.** When a worker's IC status has been conclusively established for TRS purposes, the TRS employer also must provide a copy of the worker's Independent Contractor Exemption Certificate (ICEC)

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<sup>2</sup> See Montana Code Annotated §19-20-307, *Establishing Independent Contractor Status*.

issued by the Montana Department of Labor and Industry (DLI). The IC business type shown on the ICEC must be consistent with the services to be performed on behalf of the TRS employer, and the employer must provide a currently valid ICEC for all periods of time for which the IC will perform this work.

### **When is a New Analysis Required?**

The requirement to perform a comprehensive analysis applies for every individual performing work in a position reportable to TRS on or after July 1, 2024 if the TRS employer asserts the individual is an IC. The comprehensive analysis must be performed whether the individual has never been a TRS member, is currently an active or inactive member of TRS, or is a TRS retiree.

The requirement for analysis applies even if the employer reported the same individual working in the same position to TRS as an IC prior to July 1, 2024. TRS law previously did not require a comprehensive analysis of worker status as described above, and any prior TRS acquiescence or approval of IC status does not determine the worker's status on or after July 1, 2024.

A conclusive determination of IC status is effective only with respect to the worker in the specific position and with the specific employer described in the analysis. The employer must conduct or obtain a new analysis of a worker's status to TRS if the duties and functions of the position change, if a different worker is engaged in the position, or if any other significant factor changes in the employee vs. IC analysis.

### ***Analysis Required for IC Hired Through a Third Party***

TRS employers may obtain worker services in positions reportable to TRS through third parties. If a worker providing service in a TRS-reportable position is obtained through a third-party hiring agent and the third-party hiring agent has engaged the worker as an IC, the TRS employer must analyze the worker's status with respect to the services provided to the TRS employer.

If the third-party hiring agent is also a TRS employer (the Office of Public Instruction, a unit of the Montana University System, an educational services cooperative, a CSPD, a RESA, etc.), the third-party hiring agent/TRS employer must analyze the worker's status. The fact that the worker does or may provide services in an educational services capacity on behalf of multiple TRS employers as a consequence of their hiring by an intermediate TRS employer is not evidence that the worker is engaged in an independent business and will not weigh in favor of a determination that the worker is an IC.

### ***Effect of IC Analysis and Determination on TRS Working Retirees***

Pursuant to §19-20-307, MCA, a TRS retiree returning to work in a TRS-reportable position is presumed to be an employee of the TRS employer unless and until the IC analysis is complete and conclusively establishes the retired member's status as an employee or an IC in postretirement employment. In addition, all TRS law pertaining to retired members<sup>3</sup> will continue to apply to any retiree who returns to work in a TRS-reportable position as an IC, whether hired directly by the TRS employer or through a third party.

This includes the requirement that the retiree and the employer complete and submit TRS Form 146, *Retired Member's and Employer's Notice of Postretirement Employment*. Neither the requirement to complete the IC analysis process nor a resulting determination of IC status will change or delay any other requirements of TRS law pertaining to a retired member who returns to work in a TRS-reportable position.

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<sup>3</sup> For details on eligibility for TRS retirement and postretirement employment, see the TRS Fact Sheets, "Terminating Employment and Retiring with TRS" and "Working After Retirement," available at [trs.mt.gov](https://trs.mt.gov).

## Instructions for Submitting Documentation of IC Status to TRS

The TRS employer asserting IC status of a worker must submit **TRS Form 148, *Determination of Independent Contractor Status*** to TRS as follows:

- If the documentation of IC status is a court order or an IRS SS-8 determination, an officer of the employer must complete and sign Page 1 of TRS Form 148 and must attach a copy of the court order or SS-8 determination.
- If the documentation of IC status is a written determination conducted by a qualified analyst, an officer of the employer must complete and sign Page 1 of TRS Form 148 **and** the qualified analyst must complete and sign Page 2 (certification of determination). The employer then must submit the fully signed Form 148 to TRS.
  - *Note:* The employer is *not* required to submit the qualified analyst's written determination of worker status to TRS but should retain the determination for their records.

In addition to a completed TRS Form 148 and necessary attachments, the TRS employer must also provide a copy of the following documents to TRS:

1. The IC contract<sup>4</sup> entered into between the TRS employer providing the analysis and the worker.
  - *Note:* If the TRS employer providing the analysis has obtained the services of the worker through a third-party hiring agent, the TRS employer must provide:
    - the contract entered into between the TRS employer and the third-party hiring agent, and
    - the contract entered into between the third-party hiring agent and the worker.
2. A copy of the ICEC issued by the Montana Department of Labor and Industry for the worker.
3. TRS Form 146, *Retired Member's and Employer's Notice of Postretirement Employment*, if the individual is a retired TRS member.

## Questions?

If you have any questions about the content of this Fact Sheet, please contact us.

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**Montana Teachers' Retirement System ♦ 406-444-3134 ♦ 866-600-4045 ♦ [trs.mt.gov](https://trs.mt.gov)**

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*Please Note:* This Fact Sheet is intended to provide a concise, easy-to-understand summary of TRS law and policy. The actual application of TRS law will depend upon the specific circumstances and facts presented. In determining the rights and obligations of any person, TRS law will supersede any contradictory information provided in this Fact Sheet.

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<sup>4</sup> A copy of any contract submitted must be signed by all parties to the contract. If signed copies are not available, the TRS employer must include a written statement indicating that signed copies are not available and confirming that the copy provided is a true and correct copy of the final agreement between the parties to the contract. Any addenda, attachments, amendments, exhibits, or other additions to or modifications of the primary contract must be included with the contract.