



The Business Owner's Guide to Classifying W-2 Employees and 1099 Independent Contractors



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Introduction

As a business owner, you've likely considered the benefits and potential drawbacks of hiring (W-2) employees and working with (1099) independent contractors.

In years past, most American workers held a full-time job, worked a 40-hour workweek, and were paid a salary and (often) provided benefits by their employer. Today, independent contracting has become much more prevalent, and workers are increasingly embracing this alternative employment arrangement. Business owners, too, have welcomed the option as an opportunity to access the expertise they need for an often-reduced price (since taxes, benefits, and paid time off are not typically part of an independent contractor agreement.)

But as with all staffing options, the devil is in the details. Many business owners engage the services of independent contractors—and classify them as such—but make the mistake of treating them as employees. Misclassifying independent contractors, however, can put your company at risk of violating various state and federal employment laws.

When you are knowledgeable about the legal requirements associated with each employment option, you can avoid considerable consequences.

→ **"There is a sizeable difference between employees and independent contractors. The substance of the working relationship will determine classification, not labels. You can call a worker anything you want, but the label does not determine the working relationship—the type of work they do does."**

— *Anu Mannathikuzhiyil*,
PHR, HR technology solutions manager for G&A Partners.

In this guide, you will find **strategic tips, tests, and recommendations to help you accurately classify employees and independent contractors, keep your business compliant and set your workforce up for success.**



These include:

- ▶ How to distinguish between an employee and independent contractor and tests you can apply to make sure you correctly classify individuals who work for you
- ▶ Guidelines you're required to follow when classifying—and working with—employees and independent contractors and the potential consequences of misclassification
- ▶ Common myths and facts about independent contractors
- ▶ How to determine which employment arrangement is best for your business—and under what circumstances
- ▶ Best practices you can adopt to set your independent contractor agreements up for success

CHECK IT



Characteristics of Employee Hires and Independent Contractor Agreements

The U.S. Internal Revenue Service (IRS) generally defines an **employee** as an individual who performs services for an employer who, in turn, controls how and what work is done. However, an individual is an **independent contractor** if the employer has the right to control or direct only the result of the work and not how and when the work is done.

There is complexity to each employment relationship, so it's important to understand the distinct characteristics commonly associated with the employee and independent contractor classifications.

W-2 Employees

- Work under the control and direction of an employer—who sets work hours, supervises work performance, sets the pay rate, and provides facilities, tools, and supplies needed to perform job duties
- Often work at the employer's place of business
- Receive a net salary after the employer has withheld federal income tax, Social Security, and Medicare tax under the Federal Insurance Contributions Act (FICA)
- Receive employee benefits, such as health insurance, retirement, and disability
- Are eligible to receive unemployment compensation after a layoff or termination and workers' compensation benefits for a workplace injury
- Can be terminated by an employer for reasons aligned with the state's employment laws.
- Are covered by federal and state wage and hour laws, such as minimum wage and overtime rules
- Are protected by workplace safety and employment anti-discrimination laws
- Typically work for only one employer
- Receive a W-2 form each year for tax reporting purposes

Independent Contractors (1099)

- Provide consulting services to more than one company
- Set their hours and work out of their own office or home
- Work independently and decide how to accomplish tasks without the employer's input
- Incur costs associated with performing the job
- Do not receive employment benefits from an employer
- Are paid according to the terms of a contract and are not covered by federal and state wage and hour laws. They are typically paid according to their output, not their time.
- Are not subject to employer withholdings for federal income tax, Social Security, or FICA, but must pay self-employment taxes
- Are not eligible for unemployment compensation or worker's compensation benefits
- Receive a 1099-MISC/1099-NEC form each year from each company for tax reporting purposes

* The rules above are established by the federal government. Certain states have adopted stricter requirements, so it's important to check with counsel to determine the appropriate Independent Contractor test to use in the locations in which your company operates.



TEST IT

How to Tell if You're Properly Classifying Workers

Various federal agencies and some states have tests to help business owners determine whether workers should be classified as employees or independent contractors.

States may have different or more restrictive independent contractor classification rules than those created by federal agencies, according to the **Society for Human Resource Management (SHRM)**'s **"Employing Independent Contractors and Other Gig Workers."** Therefore, in addition to taking the federal tests, employers should consult individual state laws where workers are based to ensure full compliance.



IRS Common-Law Rules

The IRS has a stake in proper worker classification. Why? Because it affects whether an employer withholds income and FICA taxes from an employee's pay and if an employer is responsible for payment of their share of those taxes. Because independent contractors are classified as "self-employed" for tax purposes, nothing is withheld from payments received, and they are responsible for paying their own self-employment taxes.

The IRS has established rules for determining a worker's status and recommends using the criteria (or factors) outlined in "Common Law Rules" when deciding how to classify individuals as independent contractors or employees.

"Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor and no one factor stands alone in making this determination."

According to the IRS
"Common Law Rules"



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The goal is to determine the degree of control and independence a worker has within three broad categories, including:

Behavioral Control

Behavioral Control refers to the degree of control an employer has over an individual's work product. Generally, a worker who is instructed when, where, and how to work should be classified as an **"employee."**

According to the IRS, behavioral controls include:

Type of Instructions Given

If a business owner dictates when, where, and how to work, it indicates an employer-employee relationship. The critical consideration is whether the business has retained the right to control the details of a worker's performance (employee) or has given up that right (independent contractor).

Degree of Instruction

The more detailed the instructions, the more control the business owner exerts over a worker.

Evaluation Systems

If an employer uses an evaluation system to measure work performance, this indicates employee status. An evaluation system that only measures results could indicate either independent contractor or employee status.

Training

If the business provides the worker with job training, it indicates that the company wants the job done in a particular way and is strong evidence that the worker is an employee. Independent contractors typically perform work based on their own training and methods.



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Financial Control

Financial Control refers to factors that demonstrate the degree to which a business owner has the right to control the economic aspects of a worker's job.

According to the IRS, financial controls include:

Significant Investment

An independent contractor often has a significant investment in the equipment they use while performing work for clients. An employee does not.

Unreimbursed Expenses

Independent contractors are more likely to have unreimbursed costs than are employees.

Opportunity for Profit or Loss

If a worker has a significant investment in the tools and equipment used on the job and unreimbursed expenses, the opportunity to make or lose money increases—this indicates independent contractor status.

Services Available to the Market

An independent contractor is generally free to seek out multiple, and possibly simultaneous, business opportunities.

Method of Payment

Employees are generally guaranteed a regular hourly, weekly (or other scheduled) wage amount. Independent contractors usually provide an invoice that lists a flat fee or an hourly rate.



3

Type of Relationship

Type of relationship refers to factors that illustrate how a worker and business perceive their working relationship.

According to the IRS, these factors include:

Written Contracts

Even if a written agreement states the worker's classification as an employee or independent contractor, the IRS says this is not sufficient to determine the worker's status. Instead, the nature of how the parties work together determines whether the worker is an employee or an independent contractor.

Employee Benefits

Businesses generally do not provide employee benefits, such as health insurance, pension plans, paid vacation, sick days, and disability insurance to independent contractors.

Permanency of the Relationship

A worker who expects the relationship to continue indefinitely is generally an employee.

Services Provided as Key Activity of the Business

A worker who provides services integral to business operations, such as an attorney working for a law firm, is more likely directed by his or her employer (employee status).



U.S. Department of Labor Economics Realities Test

The U.S. Department of Labor's Economic Realities Test (Fact Sheet 13) defines an employment relationship under the **Fair Labor Standards Act (FLSA)** and recommends using seven factors to help business owners apply employee and independent contractor classifications.

These seven (7) factors include:

1. The extent to which the services rendered are integral to 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.

Avoid Misclassification Mistakes

Anu Mannathikuzhiyil says employers should avoid classifying a worker as an independent contractor based solely on any of the following reasons:

- A worker's request to be classified—or treated—as an independent contractor
- The worker signs a contract
- The worker carries out regular work assignments on a sporadic or on-call basis.
- The worker is paid commission only
- The worker does assignments for more than one company



Employment Laws that Govern Employee Status and Independent Contractor Agreements

Several U.S. laws and enforcement agencies offer workers protection against misclassification, define “employee” status, and provide legal remedies for those who are misclassified as well as consequences for employers who misclassified them.

According to the Department of Labor’s Wage and Hour Division, legal protections generally only apply to workers who fit the definition of an “employee.” They also provide guidelines to determine if an independent contractor has been misclassified and is owed monetary and other benefits attributed to employee status.

“The financial impacts of misclassifying workers can be huge—it pays to stay in compliance,”
says Anu Mannathikuzhiyil.



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U.S. employment laws that apply to worker classification—and benefits and protections they provide—include:

U.S. Department of Labor (DOL) Laws

The U.S. Department of Labor’s Wage and Hour Division’s **“Misclassification Initiative”** is a combined federal-state effort to protect employees’ rights and prevent their misclassification as independent contractors and other **“non-employee”** terms.

The DOL initiative defines misclassification as **“employers who incorrectly treat workers who are employees under this federal law as independent contractors”** and may try to deny the worker benefits and protections to which they are legally entitled.

The DOL definition of “employee” includes:

- Working for someone else’s business
- Paid hourly, salary, or by rate
- Uses employer’s materials, tools, and equipment
- Typically works for one employer
- Continuing relationship with the employer
- Employer decides when and how work is performed
- Employer assigns the work to be performed

The DOL definition of “independent contractor” includes:

- Running their own business
- Paid upon completion of the project
- Provides own materials, tools, and equipment
- Works with multiple clients
- Temporary relationship until project is completed
- Decides when and how they will perform the work
- Decides what work they will do



Misclassification can impact a worker's right to minimum wage, overtime, and other related benefits provided under laws administered by the DOL, which include:

- **The Fair Labor Standards Act (FLSA)** provides minimum wage and overtime pay to workers classified as employees in the private sector and federal, state, and local governments. It also requires employers to keep employment records
- **The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)** protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping.
- **The Family Medical and Leave Act (FMLA)** entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons and continuing group health insurance coverage under the same terms and conditions.



If an employer is found in violation of employee misclassification under the DOL initiative, they could be required to pay:

- ALL unpaid employer federal, state, and local income tax withholding payments as well as a percentage of the employee's income tax withholding and FICA payments (Social Security and Medicare contributions)
- Federal and state unemployment insurance taxes
- Workers' compensation insurance premiums
- Overtime compensation and minimum wages
- Back wages
- Work-related expenses
- Sick and vacation pay
- Health insurance and other benefits
- Additional benefits provided by the FLSA, MSPA, and FMLA

They could also be subject to penalties for each violation. In addition, employers are at risk of class- or collective-action lawsuits brought by workers for unpaid overtime or minimum wage violations under the **Fair Labor Standards Act (FLSA)** or state wage and hour laws.

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Internal Revenue Code

Employers must withhold income taxes for W-2 employees but not 1099 independent contractors. An employer who misclassifies an employee as an independent contractor with no reasonable basis for doing so can be held liable for employment taxes for that worker, including all unpaid employer federal, state, and local income tax withholding payments as well as a percentage of the employee's income tax withholding and FICA payments (Social Security and Medicare contributions).

However, employers will not owe employment taxes for "misclassified" workers if they are found eligible for IRS "[Section 530 Relief Requirements](#)."
To do so, they must meet all three of the following requirements:

1. Reporting Consistency

The employer has filed all required federal tax returns on time (including information returns) consistent with their treatment of each worker as not being an employee.

2. Substantive Consistency

The employer has treated the workers, and any similar workers, as independent contractors.

3. Reasonable Basis

The employer has a reasonable basis for not treating the workers as employees. A "reasonable basis" includes reliance on a court case about federal taxes or a ruling issued to the employer by the IRS, or the IRS audited the business at a time when the employer treated similar workers as independent contractors and the IRS did not reclassify those workers as employees.

The IRS has a Voluntary Classification Settlement Program (VCSP) that provides employers the opportunity to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes for eligible taxpayers who agree to treat their workers as employees.

3

State Laws

State unemployment insurance and workers' compensation laws provide protections for workers laid off or injured on the job, respectively. However, if workers are classified as independent contractors, they are not eligible for compensation and other benefits afforded under these programs.

If a state unemployment agency believes a worker was misclassified as an independent contractor, they could grant the worker benefits and require the employer to pay unemployment insurance premiums and penalties. Contact the relevant state agency to learn more about tests that determine workers' classification and other eligibility under state unemployment insurance laws.

An employer can be held liable for a misclassified independent contractor's on-the-job injuries and penalties as well. To find out how the employment status of workers affects workers' compensation benefits, contact the relevant state workers compensation board.



Misclassification Myths and Facts

Misclassification can occur when business owners and workers are misinformed—or are not educated—about employment laws. According to the Department of Labor’s Wage and Hour Division’s “[Myths About Misclassification](#),” the following real-world scenarios are commonplace and present issues for employers and workers if left unchecked.

MYTH: My boss calls me an independent contractor, not an employee. But it doesn’t matter, as long as I get paid.

FACT:

A worker who is misclassified as an independent contractor may be denied benefits and protections to which employees are legally entitled, including:

- The right to minimum wage and overtime pay
- The right to unpaid, job-protected family and medical leave
- Certain anti-discrimination and anti-retaliation protections
- The availability of workers’ compensation if injured on the job
- The availability of unemployment insurance
- Employer payment of half of the Social Security and Medicare taxes

Misclassification also hurts law-abiding business owners who can’t compete on a level playing field with employers who wrongly classify their workers as independent contractors and lower their costs.

MYTH: If I am classified as an independent contractor, I am not eligible for unemployment insurance.

FACT:

A worker may still qualify for unemployment insurance even if classified as an independent contractor. Each state follows its statutes, regulations, or policies to determine whether an employer-employee relationship exists. The state agency will decide if the classification is correct under its laws, or the worker should be classified as an employee and eligible for unemployment insurance.



MYTH: I received a 1099 tax form from my employer, which makes me an independent contractor.

FACT:

Receiving a 1099 form does not make a worker an independent contractor. It is crucial to determine if the worker's situation falls within the law's definition of employment under the FLSA, FMLA, or state law. For example, under the FLSA, a worker is an employee if their work indicates they are economically dependent on an employer.

MYTH: I was told that I am an independent contractor, so this means that I am not entitled to any of the benefits and protections provided to people who meet the definition of an "employee."

FACT:

The benefits and protections available under federal and state employment laws are generally available only to workers classified as employees and are not available to independent contractors. However, a legitimate independent contractor under one law may still be classified as an employee under other laws, so employers should perform due diligence and determine all workers' status according to all relevant laws.

MYTH: I have an employer identification number (EIN) or paperwork stating that I perform services as a Limited Liability Corporation (LLC) or other business entity. This means that I am an independent contractor.

FACT:

An EIN or paperwork stating that a worker performs services as an LLC, sole proprietorship, or another type of business does not by itself make them an independent contractor. This is particularly true if an employer requires the worker to file business paperwork and obtain a business name to get the job or to receive payment for services. Under the FLSA, FMLA, and MSPA, how the worker or the employer characterizes their relationship is irrelevant to determining a classification; what matters is whether the worker is economically dependent on the employer (an employee) or in business for themselves (an independent contractor).

MYTH: My employer wants me to be an independent contractor, which means I am not an employee.

FACT:

An employer cannot misclassify a worker as an independent contractor out of choice—it must be based on the law’s definition of “employee.”

MYTH:

I telework or work off-site, so I am an independent contractor.

FACT:

A worker cannot be classified as an independent contractor simply because they work off-site or from home, because both employees and independent contractors may telework or work off-site. An employer may still control or have the right to control how work is performed (employee) even if they are off-site and not subject to constant supervision.

MYTH:

I have been an independent contractor for years. This means I will continue to be an independent contractor.

FACT:

Being a bona fide independent contractor in the past does not mean a worker will always be classified as an independent contractor. If the nature of the work relationship changes, a worker’s classification may transition from independent contractor to employee.

MYTH:

I am an independent contractor because it is an established practice in my industry to classify workers as independent contractors.

FACT:

“Common industry practice” is not an excuse to misclassify workers under the FLSA. Regardless of industry practice, if the work performed falls within a law’s definition of employment, a worker cannot be classified as an independent contractor and denied rights as an employee under that law.

Employee Hires or Independent Contractor Agreements

Which is the Best for My Business?

When considering what type of employment relationship is best for your business—employee or independent contractor—there are many factors to consider. The first and most important is understanding the classification system and your responsibilities according to the DOL, IRS, and state laws.

But it's a good idea to extend your decision-making process beyond that. Think about what type of working arrangement(s) best fits your company culture, operational structure, and typical schedule, and consider the pros and cons associated with each type of working.



Pros and Cons

The Employer-Employee Relationship

PROS

- **Long-Term Commitment**

Employees who seek long-term employment are more likely to exhibit loyalty, dedication and attention to their job and your company. A stable, engaged workforce can, in turn, strengthen your company's employee retention and recruitment efforts.

- **Consistency and Control**

When you hire employees, you have a reliable, dedicated team to work on projects as needed, according to Business.com's "[When to Hire a Full-Time Employee vs. Contractor.](#)" Since you have more control over your employees than you do contractors, you can alter their workloads to fit the needs of your business.

- **Dedicated Pipeline of Internal Talent**

The time and money you invest in training, mentoring, and developing your workforce can reap benefits in the form of a strong talent pipeline that your organization can rely on as employees advance through your company's ranks.

- **Exclusivity**

Full-time employees are less likely to work for more than one employer, so they are less distracted by outside forces and spend more time learning about your company. That can translate to higher employee engagement and productivity.

CONS

- **Higher Labor Costs**

Employers are responsible for paying employees' wages, employment taxes, income and unemployment tax withholdings, workers' compensation insurance, overtime pay, and training and travel expenses. If you offer employee benefits, you will also pay costs associated with health insurance, dental and vision plans, retirement contributions, and paid time off.

- **Lack of Specialized Training**

At times, your company requires the services of individuals with specialized skills, knowledge, or training (i.e., lawyers, accountants, engineers.) If you do not have an employee on staff with the necessary skillset(s), it may require time and money to recruit and hire a new employee or train an existing employee.

- **Lost Productivity**

If you employ a worker in a position that does not have a consistent schedule and set of responsibilities, you may end up paying full-time wages, benefits, and other expenses for less than full-time productivity.

Pros and Cons

The Employer-Employee Relationship

PROS

- **Minimal Supervision**

An independent contractor maintains control over their work schedule, which reduces the time and expense your company would otherwise spend supervising and managing a worker in the same position. Instead, you can expect the contractor to work and manage their time accordingly.

- **Lower Labor Costs**

Even if you pay an independent contractor a substantial fee for services, you may still encounter lower overall costs because you are not responsible for additional expenses, such as employment taxes, income, and unemployment tax withholdings, workers' compensation insurance, overtime pay, and benefits.

- **Short-Term Services**

An independent contractor is ideal when you need a highly skilled worker to work on a project or temporarily fill in for an employee on extended leave. Then, when the job is complete or your employee returns, you won't have to face the trauma, expense, and potential legal trouble that can accompany firings and layoffs.

- **Less Responsibility**

Because independent contractors essentially run their own business, your company is not responsible for providing the materials or tools they need to do their work, a place to perform their job, or instruction on how to perform the work.

CONS

- **Reduced Company Loyalty**

Independent contractors are less likely to develop feelings of loyalty for your company because they are excluded from situations that typically foster employee engagement, such as company parties, team-building exercises, and developmental training.

- **Lack of Product or Company Knowledge**

According to Business.com, "Contractors are only with your company for a short period of time, so their knowledge of your company and product will be limited. Although they can do the necessary research to complete a project for you, they will lack the insider brand knowledge that can only be learned over a longer time with the company."

- **Limited Control**

The nature of the independent contractor relationship involves a high degree of autonomy, which means you have no control over how or where their work is done. If you interfere in their work, you risk treating the independent contractor as an employee and could be subject to the responsibilities that accompany that employment status.

- **Varied Availability**

Because independent contractors often work with multiple clients, you may have trouble lining up an individual you trust and enjoy working with if they are committed to other projects.

Best Practices

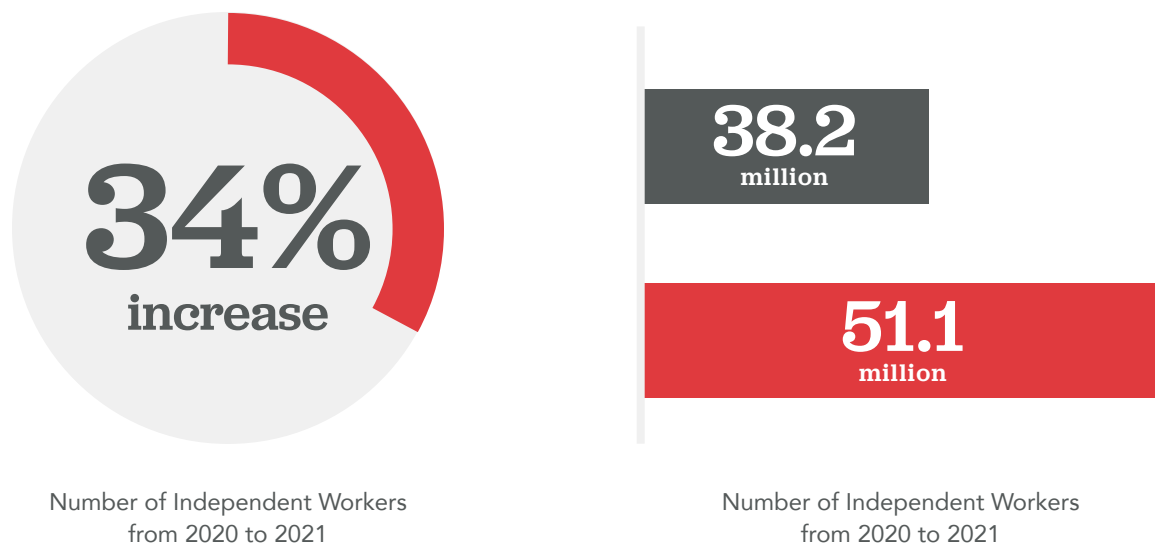
Making the Most Out of Your Independent Contractor Agreements

Because the labor market has experienced difficulties in recent years and companies are finding it more challenging to recruit, hire and retain quality employees, it makes sense for your company to adopt a proactive and flexible approach to working arrangements.

According to MBO Partners' "11TH ANNUAL STATE OF INDEPENDENCE: The Great Realization" report, the number of independent workers dramatically rose 34% from 38.2 million in 2020 to 51.1 million in 2021.

"The pandemic has reinforced the growing view that traditional jobs are riskier and less secure than they once were," states the report. "At the same time, as more people work as independents for longer periods, they—and their friends and colleagues—start to view it as less risky."

More and more employees are moving away from working full-time for a company and moving toward independent contractor status.



Source: "11TH ANNUAL STATE OF INDEPENDENCE: The Great Realization" by MBO Partners

If your company chooses to include independent contractors in your personnel mix, we recommend adopting the following best practices to create a welcoming environment for them and avoid an unintentional employment misclassification:

- Create a selection plan that details your personnel strategy and how you intend to work with independent contractors.
- Develop a talent pool of independent contractors you have identified, vetted, and developed relationships with over time. That way, you have a solid source of independent contractors to call on when a particular need or project arises.
- Use written independent contractor agreements containing language that helps establish the legal details of their independent contractor classification.
- Make a checklist of items you need from an independent contractor during the project onboarding process, including:
 - A W-9, which is used to verify tax identification numbers for independent contractors. You will need this form to file 1099-NEC or 1099-MISC forms for contractors at the end of the year. A W-8 BEN is a similar form you will need if you consider hiring someone outside of the U.S.
 - A confidentiality agreement to help protect your company's proprietary information and prevent an independent contractor from sharing it with third parties or competitors
 - A project fee agreement that contains a detailed description of the project scope, deliverables, and price and ensures that you and the independent contractor are on the same page
 - Company information—literature or videos—that helps educate the independent contractor about your business, brand, and products or services
 - Access to systems they need to complete the project
 - Organizational contacts who can answer questions or address concerns related to the contractor's work
- Adopt a company policy concerning the use of independent contractors. Do not treat independent contractors as you treat regular employees but ensure they know and understand your company's policies and procedures.
- Conduct an independent contractor exit survey to get feedback after the project is finished. It will help you identify issues and areas for improvement in your processes.
- To avoid the pitfalls of misclassifying workers, engage a human resources expert or team of HR compliance professionals who have a deep understanding of employment nuances and can ensure compliance with all applicable federal and state employment laws.

Sources



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