



Business Guide to Freelancer Trends and Practices

The stark reality is that freelancers and contingent workers are becoming more and more popular with workers because of the **freedom and flexibility** it provides both workers and businesses. With the format being highly appealing and lucrative for certain established independent skilled talent, workers and businesses alike are taking advantage of the trend. It's only a matter of time before it's no longer an "if" we move to working with independent contractors but a **"when will we."**

Consider this:



Gartner recently released a survey that revealed 32% of organizations are replacing full-time employees with contingent workers as a cost-saving measure.¹



45% of businesses are finding a growing need for on-demand and real-time talent.

-WorkMarket



As a result of the global health event, Gartner analysis has shown that organizations will continue to expand their use of a contingent workforce in an effort to maintain more flexibility.¹

Navigating the compliance nuances surrounding the procuring, paying and support of these types of workers can be, to put it lightly, challenging. There is no substitute for an individualized review of your needs and evaluation by competent, experienced counsel of your choosing.

WorkMarket understands and works with companies who are choosing to engage with independent workers.

We put this guide together with the intention of providing insights into some of the newest regulations surrounding compliance and engaging and managing relationships with independent contractors, common questions we've come across, and a quick checklist to help inform whether a worker has what we see as common attributes of workers who are often treated as employees versus independent contractors. We hope this helps!

We do note that it is important that you understand this information is provided as an informational conversation and is not legal advice, and should not be considered as legal advice. Every situation and relevant law has nuances that you should review with your own counsel.

¹<https://www.gartner.com/en/newsroom/press-releases/2020-05-06-gartner-identifies-nine-trends-for-hr-leaders-that-wi>

Worker Classification Checklist

Differentiating Employees (W-2's) and Independent Contractors (1099's)



Independent Contractors (IC)

1099 workers should have written agreements describing the terms, scope, and duration of their assignment.

Contingent workers should have flexibility, where appropriate, to set their own working hours.

Independent contractors may use their own office space or equipment, where appropriate.

Gig workers should determine the manner in which they complete their assignments to the extent possible.

Independent contractors are paid pursuant to the terms of their agreement.

Contingent workers do not need extensive training that may be offered to employees to complete their assignments.

Gig workers do not receive employee handbooks or policy manuals – only those policies that they need to know to successfully complete their assignment.

1099 workers do not attend certain internal functions or events meant only for employees.

Contingent workers are not referred to as employees or being employed by your company.

Independent contractors have the ability to affect their overall profitability and loss.

Independent contractors do not receive benefits provided to employees of the company.

Independent contractors provide their own tools, equipment, and supplies.



Employees

Employees may work for indefinite periods of time.

The company determines employees' working hours.

The company provides employees with office space and equipment.

Employees may follow specific procedures and processes to complete their work, as required by the company.

Employees are paid at set periods of time, following standard company payroll schedules.

Employees participate in full new hire and ongoing training offered by the company.

Employees receive and acknowledge employee handbooks or policy manuals.

Employees are invited in internal meetings and events.

Employees have formal business titles, business cards and stationary.

Employees perform services with a guaranteed hourly rate, piece rate, or salary.

Employees receive various benefits that are limited to the employee population, such as 401(k) contributions, vacation time, and other benefits.

Employees are provided with supplies and may also be provided with equipment to perform services for their employer.

Note: Your company's individual circumstances may vary since every company operates differently and every engagement is unique. This information is not legal advice. Any information provided here is by nature subject to revision and may not be the most current information available on the subject matter discussed. You could consult with your attorney for legal advice.

NEWS YOU NEED TO KNOW:

Important 2021 Compliance Updates on Contingent Workers

Ellen Feeney, VP - Counsel for ADP is Addressing Compliance Risk in your Extended Workforce and how you can mitigate risk in today's 2021.

What is the 2021 update?

A new administration in Washington, DC mean more changes on the labor compliance front. 2021 will continue to be a busy year with more developments on the federal and state level when it comes to worker classification between W-2 employees and 1099 freelance contingent workers.

Prior to the change in administration, on January 6, 2021, the United States Department of Labor (U.S. DOL) announced a final rule clarifying the standard for employee versus independent contractor ("1099s"). Under the Fair Labor Standards Act (FLSA), the

DOL reaffirmed an "economic reality" test to determine whether an individual is in business for him or herself (independent contractor) or is economically dependent on a potential employer for work (FLSA employee). The DOL under the Biden administration, however, withdrew this rule on May 5, 2021.

Overall, we expect more aggressive enforcement of employment regulations from the federal government under the Biden administration, including on worker classification issues. 2021 is likely to be filled with non-stop legislation, regulatory and executive actions.



What does this mean for me and my business?

Before employers make changes to their worker classification practices, they should see how the new administration approaches this issue. Specifically, here are some data points to consider:

According to Biden's Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, **Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and taxes.**

Employers are subject to **classification standards set by the IRS, other federal laws (FMLA, OSHA, ERISA) and state laws.** These standards are not consistent and they change frequently.

Employers approach misclassification differently **depending on their work locations, industry, and overall risk tolerance.** Risk-adverse employers with employees in multiple jurisdictions generally have processes to ensure that the independent contractors they use qualify under the most stringent applicable standards.

Is there any legislation pending that could affect how my business uses independent contractors?

The PRO Act would alter the legal landscape for employers and increase their legal and regulatory burdens. The PRO Act is a sweeping labor relations bill that consists primarily of amendments to the National Labor Relations Act (NLRA), the Labor Management Relations Act (LMRA), and the Labor Management Reporting and Disclosure Act (LMRDA). It would implement the "ABC" Test codified in California's AB 5, which makes it much more difficult to classify workers as independent contractors. That said, unlike AB 5, the PRO Act implements the ABC Test *only* for purposes of the NLRA. The PRO Act does not seek to amend any other federal law, or indirectly, any state law regarding independent contractor status of workers.

With the current composition in the Senate, it is not likely that the PRO Act in its current comprehensive form will be enacted. Ten Republican senators are needed to break a filibuster to allow the PRO Act to be voted upon in the Senate. It seems that a number of Senators, including Angus King (who is technically an independent but caucuses with the Democrats), are wary of any kind of ABC Test at the federal level. Indeed, in 2019, Senator King introduced the Portable Benefits for Independent Workers Pilot Program Act, which would have assisted the independent workforce in finding flexible, portable benefits that fit their needs and the nature of their work, without the benefits being considered an indicia of employment.

What's going on in California?

California has been a hotbed of activity related to employee and independent contractor status and has been **the focus of national attention**. In 2018 California enacted AB 5, a law establishing a new strict "ABC test" to identify workers as employees or independent contractors. AB 5 created a presumption that workers are employees, but also included several exemptions. In 2020, California enacted AB 2257 which exempted additional industries and occupations from the strict ABC test. Currently, approximately 75 occupations are exempt from AB 5.

For more information, see https://www.dir.ca.gov/dlse/faq_independentcontractor.htm

In November 2020, California voters approved Proposition 22, the ballot initiative that classifies drivers for app-based transportation and delivery companies as independent contractors and requires app companies to provide those workers certain benefits. This is significant because it creates a new class of worker in between an independent contractor and employee. This hybrid approach – an independent contractor with benefits – will be pursued by rideshare companies in other jurisdictions and may be the start of a trend. On January 12, 2021, CA rideshare drivers filed a lawsuit to overturn Prop 22. In February, the Supreme Court refused to hear the constitutional challenge to Prop 22 raised by this lawsuit.

What's next?

How gig workers should be treated under federal labor law is a major issue debated among regulators, labor unions, workers, and the business community. **That debate will continue in 2021 and will likely result in changes by the new administration.**

In the past, the Trump administration and many businesses have generally supported policies to keep these workers classified as independent contractors rather than employees under state and federal laws. The FLSA deals mainly with minimum wage and

overtime protections while the National Labor Relations Act (NLRA) deals with unionization rules. Both apply only to employees. Workers classified as independent contractors generally aren't eligible for paid leave, workers' compensation, and unemployment insurance. Rideshare companies will likely pursue a hybrid approach in other jurisdictions, and it is possible this approach will be extended to other industries. This will be an area that will require on-going monitoring in 2021 and years to come.

COMPLIANCE RESOURCES

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration. This information is provided as a courtesy to assist in your understanding of the impact of certain regulatory requirements and should not be construed as tax or legal advice. Such information is by nature subject to revision and may not be the most current information available. ADP encourages readers to consult with appropriate legal and/or tax advisors. Please be advised that calls to and from ADP may be monitored or recorded.

Frequently Asked Questions

As we work with industries across the nation, several questions continually come up as businesses consider tapping into this rapidly growing workforce. Ellen Feeney, VP Counsel at ADP, took some time to answer some of our most frequently asked questions.

1. Are companies allowed to use 1099s at all in California now?

Yes. Companies are still allowed to use 1099 workers or independent contractors, but you need to do the analysis based on the applicable test that applies. In many instances, it will be the ABC test that was specified in AB 5. In other situations, it will be the Borello multi-factor test. Both of these tests start with a presumption of employment, meaning the worker presumed to be an employee unless you satisfy the test. The main takeaway is that employers need to be smart and make sure they do their homework.

2. Do we need to convert all our 1099s to W-2s?

No. But you need to do the analysis. AB 5 does not mean that workers are automatically reclassified as employees instead of independent contractors. Employers should look at their working arrangements and make sure they are appropriately classifying their workers as required under law. This is an area where it makes sense to consult with your employment law counsel. You need to do a risk analysis and decide what makes most sense for your company given your overall risk tolerance, where you are doing business, and your business model.

3. Which occupations are exempt from CA AB-5?

There are many. Too many to list here. Some of the most common are occupations related to creating, marketing, promoting or distributing sound recordings, insurance agents, doctors, attorneys, engineers, architects, direct salespersons, home inspectors, HR professional, travel agents, and freelance writers, and illustrators. There are some additional laws that create exemptions, and some have time limitations attached to them. For example, AB 323 exempts newspaper distributors and carriers from the ABC test until January 1, 2022. You want to review the exemptions set out in the law and consult with counsel to make sure you are correctly applying an exemption to your particular circumstances. You still need to apply the Borello multifactor test. There is still a test – it is just different.

4. Does AB 5 apply to workers out of state?

No. AB 5 and AB 2257 do not change how workers outside the state of California are classified.

5. We are seeing a lot of questions about specific industries and how AB 5 applies. Ellen, any thoughts here?

There are now approximately 75 businesses, occupations, or contracting relationships, that are exempt from the ABC test. Many industry and trade groups sought exemptions from AB 5 with mixed success. It is worth checking whether your industry received an exemption. If you are part of an industry trade group, they should be a good source of information.

6. How long can you use an independent contractor before the worker is considered an employee?

There really isn't a hard and fast answer to this question. Some organizations limit their risk by capping the use of an independent contractor for 6 months or a year. Time is just one consideration, but also important is how permanent the relationship is. If the expectation is that the relationship will continue indefinitely that one factor tends to favor an employer-employee relationship (that may be overcome by other factors, depending on the relationship).

7. Do you think Prop 22 will be repeated for other industries?

It is unclear at this point. While the success of Prop. 22 has demonstrated it is possible for large businesses and industries to forge their own path, it is not clear that this is a repeatable process for other industries. The app-based ride share and delivery companies spent over \$200 million on this effort, it was the most expensive ballot initiative in California history. If you live in California, there was no escape from ads about Prop 22 leading up to November's election.

Many other industry and trade groups sought exemptions from AB 5 with mixed success. What is more likely than Prop 22 being repeated for other industries is that the app-based transportation and delivery companies behind Prop 22 will try to replicate this effort in other states. I believe it was the CEO of Uber or Lyft who said he wanted Prop 22, the carveout from the ABC test, to be a template for regulating the gig economy in other states and nations.

In the past several Congresses, there has been legislation introduced in Congress to provide "portable" benefits for gig workers. The legislation would create a \$20 million grant program for states or nonprofits to pilot portable benefit plans that would allow independent contractors to carry paid leave, workers' compensation and unemployment insurance benefits from job to job. At this point, it is unclear if in the current Congress there is a path forward for this type of approach, but there are discussions happening related to having independent contractors with benefits –

somewhat similar to what happened with Prop 22 in California where the workers are still independent contractors but with a minimum level of pay and benefits, like some employer health care provisions. This is an area, we are closely monitoring, especially what it would mean for employers.

8. What are some good sources of information on AB 5?

Webinars are a good source of information. I also like looking at the websites of the enforcement agency so the State of California has published some information and FAQs on their website. Law firms, business groups, like the CalChamber, and industry trade groups, are all good sources of information for businesses.

9. What are some areas of concern when using independent contractors?

You always want to be guided by the relevant law whether it's federal, state or local. Some potential red flags are former employees returning as contractors, issuing a Form 1099 and a Form W-2 to the same worker; a worker who receives a Form 1099 for multiple years having the appearance of an annual salary; contractors who perform the same work as employees, contractors with management titles, and supervising employees, contingent workers paid by the hour and not compensated tied to a project or assignment, and workers who carry out the core business of your business.

Let me also address the other side of the coin and touch on some best practices. You can use contingent workers who are from a business entity with a FEIN, compensate workers based on what is accomplished rather than by the hour, use workers who issue or are issued invoices rather than completing timesheets. Look to have workers who are engaged for specific periods of time rather than on an open-ended or indefinite basis, contractors who work for multiple clients, and workers who have a separate business. Consider auditing your practices and also using technology like WorkMarket to put in place processes and controls that align with your compliance objectives.

10. Does AB 5 apply to public employers in California?

Yes. Some California laws don't apply the same to private and public employers but AB 5 does.

11. Does AB 5 apply to interns and volunteers?

No. There are other tests and standards that apply under California law to determine whether someone is an employee or a volunteer. This isn't addressed by AB 5.

12. What other states use an ABC test?

There are currently about 30 states that use an ABC or some variation test to determine employee or independent contractor status. California we covered. Other states are Connecticut, Delaware, Illinois, Indiana, Massachusetts, Nevada, NJ, Vermont, Washington, and West Virginia. There could be variations in ABC factors which is why you hear the caveat that states use some version of the ABC test. There are some states that use only the A & C factors, like Georgia and Colorado. As a hiring entity, you need to start by understanding what states you operate in. You want to make certain your approach is consistent with state laws where you are operating. Prior to the pandemic, some states were considering legislation similar to AB 5, including Illinois, New Jersey, and New York, but state legislatures have been busy addressing the pandemic which has slowed the legislative calendar in most states. We expect to see continued activity in this area.

13. Is AB 5 different from the Dynamex ruling?

Dynamex put in place the ABC test for deciding whether a worker is an employee or independent contractor for claims arising under California's wage orders which govern claims relating to minimum wage, overtime or failure to meal and rest periods in California. California employers know all about the California wage orders. AB 5 expanded the coverage of Dynamex to also apply to California's labor code and unemployment insurance code. AB 5 also gives powers to California's Attorney General to pursue claims against employers.

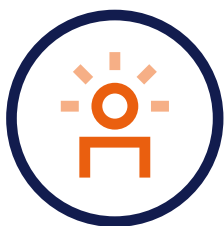
14. Can workers be considered employees under California law if they are not considered employees under federal law?

This is a good question. Workers can be employees under California law even if they are not considered employees under federal law for purposes of the IRS or FLSA. This is because there are different tests used to determine employee status under California law as under federal laws. The most common test on a federal level is the IRS test which is important for federal employment tax purposes. According to the IRS the general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not what will be done and how it will be done.

15. Does Prop 22 apply to more than app-based delivery drivers?

No. It is limited to app-based drivers, such as drivers for Lyft, Uber, DoorDash. Prop 22 was backed by Lyft, Uber, DoorDash, Instacart and Postmates.

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ABOUT WORKMARKET

WorkMarket was founded in 2010 and in 2018 was acquired by ADP, a global provider of HR technology and services. With ADP resources, WorkMarket continues to be focused on providing enterprise technology to help companies unlock the power of their extended workforce.