



ask



02.16.21

Dear HR Knowledge: How can I make our independent contractor an employee?

When it comes to worker classification, on the surface it may seem like there's a simple answer: flip a switch and start paying the worker W2 wages instead of payment on a 1099. Alas, it's not that easy.

There is no bright-line test to determine when a worker should be an employee versus a contractor and the distinction is not always clear, but the responsibility for classifying a worker correctly falls on the employer. There is a common misconception that you can just reclassify a 1099 worker as an employee and be safe treating him/her as such if both parties agree, but that's not the case. Employers must apply all applicable "tests" and follow the guidance and regulations set forth by both the Department of Labor (DOL) and Internal Revenue Service (IRS).

The DOL, IRS, and many states use different analytical frameworks. In fact, the multiplicity of these tests applied across federal and state laws could make it possible for a worker to be classified as a contractor under one law but as an employee under another. Due to the patchwork of varying state and federal laws, businesses of all sizes often are challenged to accurately classify their workforce. What we do know is that many states take a strict view of classifying contractors, such as in Massachusetts, where there is a presumption of employee status unless the employer can prove otherwise.

This content is provided with the understanding that HR Knowledge is not rendering legal advice. While every effort is made to provide current information, the law changes regularly and laws may vary depending on the state or municipality. The material is made available for informational purposes only and is not a substitute for legal advice or your professional judgment. You should review applicable laws in your jurisdiction and consult experienced counsel for legal advice. If you have any questions regarding this content, please contact [HR Knowledge](#).

Without going into detail on each “test,” the underlying analysis is fact-specific, meaning employers cannot rely on one factor but instead examine the entire employment relationship in terms of the degree of control of the performance of the work. It’s also best practice to document your findings of the factors used in coming up with the determination.

If you determine that your contractor is, in fact, an employee, there are several steps involved and potentially different courses of action to take depending on the situation. Before you make any changes, we recommend obtaining a second opinion from either legal counsel or an HR consultant. Doing so can help to corroborate your findings or not, as well as assess the level of risk.

Once you are ready to reclassify a contractor as an employee, you will want to develop a checklist of action items. Here we have outlined the basics, but keep in mind that each circumstance is different.

Have a payroll system in place

To start, ensure you have a payroll system set up, which includes state tax identification numbers. When it comes to taxes, contractors are used to paying their own taxes, so now both the employee and employer will share tax responsibility. Federal and state regulators take this issue seriously and have recently reenergized their efforts to challenge worker classification.

Determine specifics of employment

Next, you will need to determine the employee-specific arrangement, including rate of pay, exempt or nonexempt status, full-time or part-time, and regular or temporary. These classifications will help determine benefit eligibility; but be aware that depending on what state the employee works in, there may be mandated benefits such as paid sick time or paid family and medical leave. There could also be numerous regulatory compliance action items such as employee handbook updates, notice requirements, and required trainings. The employee would also go through your standard new hire onboarding process, where they would complete forms such as I-9, tax forms and other new hire data gathering.

Be mindful of messaging

These are the basics to consider when it comes to the conversion. One of the most fundamental pieces, though, is the messaging to the worker. Depending on the details of the situation, this is an area for which we recommend a mindful approach, meaning don’t go it alone — engage with your employment attorney and/or HR experts for the best approach to your particular situation in order to reduce compliance risks.

The takeaway? Always think twice before engaging with an independent contractor. Employers should really take a closer look to understand what legally qualifies as a contractor to avoid penalties that could cost them big money in misclassification fines.

This content is provided with the understanding that HR Knowledge is not rendering legal advice. While every effort is made to provide current information, the law changes regularly and laws may vary depending on the state or municipality. The material is made available for informational purposes only and is not a substitute for legal advice or your professional judgment. You should review applicable laws in your jurisdiction and consult experienced counsel for legal advice. If you have any questions regarding this content, please contact [HR Knowledge](#).

The People Simplifying HR

For almost twenty years, HR Knowledge has made it our mission to demystify the complex and daunting process of HR management. We do more than just provide the level of service and technology you'd expect from an industry leader. We combine unparalleled passion for service with our decades of HR, payroll, and benefits experience to provide our clients with personalized and actionable advice that is second—to—none. From managed payroll to employee benefits to HR support, we can help your organization thrive, grow, and reduce operating costs—no matter what industry you serve. Whether you're interested in our Full-Service solution or just need your employee handbook written, HR Knowledge can help you minimize risk while staying on top of compliance regulations. The bottom line? We're not just another cloud-based technology company that also does HR, #WeAreHR. [Get the scoop](#) on how we can help you simplify HR.



@WEAREHRK