

LEGAL DO'S & DON'TS, FACTS & MYTHS

PROBLEM STATEMENT

With the rise in the use of external workers, there's an inevitable rise in associated legal matters. The legal terrain regarding external workers is muddled with various court rulings, advice, and recommendations that are handed down across federal agencies, states, industries, and courts. Taken together, these court rulings, advice, and recommendations can be overwhelming, confusing, and even conflicting. Instead of trying to avoid the risk associated with external workers by avoiding external workers all together, SHRM encourages organizations to equip themselves with the knowledge needed to strategize, address, and, ultimately, mitigate their risks. In this section, we provide a framework to prepare HR practitioners with the information needed to better understand, strategize, and navigate the legal terrain surrounding external workers.

KEY TAKEAWAYS

- Understand the types of external workers your organization uses, and work with your legal department and leadership to develop policies and procedures specific to those types of workers.
- Avoid myths that suggest that any single action incurs or avoids legal risk. Learn what really matters.
- For all types of external workers, avoid treating them just like employees. Develop external-specific alternatives to recruiting, onboarding, managing performance, compensating, and offboarding that reflect the type(s) of external workers you utilize.
- Independent contractors control how the work is done, while the organization exercises control over what work is done. Control is a main determinant in misclassification legal cases.
- Temporary workers are primarily the employees of their staffing agency. Host employers should communicate temporary employees' performance directly to the staffing agency and allow the staffing firm to provide the performance feedback to them. Host employers should also refer all personnel matters relating to temporary employees to the staffing agency.
- HR must advocate for external worker policies and practices that maximize the value of external workers to the organization and minimize disruptions to workplace culture and to internal employees. Organizational leaders must balance these business needs with legal risks in setting external worker policies.

THE MYTHS

There are nearly as many myths around the legalities of utilizing external workers as there are external workers themselves. How many statements like the ones below have you heard?

- *“We can’t keep a temp longer than a year; it’s the law.”*
- *“As long as Han signs a waiver saying she’s a contractor, everything is ok.”*
- *“If someone brings in a cake for an employee’s birthday, the temps aren’t allowed to eat any.”*
- *“John is retiring on Friday, but don’t worry, he’ll be back as a contractor on Monday, so we won’t lose any continuity.”*
- *“Salah will be out on FMLA leave for 12 weeks, so everyone will just have to buckle down and cover her work; we’re not allowed to bring in someone to help during her leave.”*
- *“It doesn’t matter that Marcus completed his contracted work better and faster than the contract required, if we give him a bonus, that makes him an employee.”*
- *“We can’t keep any records on our temps or contractors in the database, that would put us at risk for co-employment.”*

All of these statements are **myths**. The determination that a worker is a temp or contractor is complex, and not dependent on a single factor. Any statement implying that a single factor either creates risk or makes an organization safe from risk is inadequate at best and dangerous at worst. And any broad statement that workers can seamlessly transition from employee to external worker status with no changes suggests that the speaker is either misinformed or willfully ignorant.

We will review the principles and important areas of concern in this toolkit so that HR professionals and business leaders understand the fundamentals of the legal issues and are prepared to discuss the utilization of external workers in a realistic and practical manner with their Legal teams and leadership. This toolkit was developed in the Summer of 2019 and cannot speak to any changes in law occurring after that time. This content is provided as a service to our readers and members. We cannot offer legal advice, and cannot guarantee the accuracy or suitability of this content for a particular purpose. Each organization (and its HR professionals) must seek legal guidance for its specific worker situations.

RISE OF EXTERNAL WORKFORCE AND CONCERN FOR LEGAL RISKS

Both the value and legal risk of external workers is recognized among most HR professionals. Approximately 88% of HR professionals agree or strongly agree that external workers positively contribute to the business productivity of their organization.¹ The benefits of hiring external workers include easier access to a greater range of talent and more specialized skills, faster hiring, and more flexibility with the ebb and flow of business demands.

However, some HR professionals and organizations have been apprehensive to embrace the external workforce due to fear of legal issues. 75% of HR professionals report some level of concern for the legality of external workers, with 11% reporting that they were very concerned. One of the most infamous legal cases that brought the concern of mismanaging the external workforce to the forefront was *Vizcaino v. Microsoft Corporation* (1997), in which Microsoft ended up having to pay its external workers \$97 million.² Other companies facing litigation regarding worker misclassification include Uber, GrubHub, and DoorDash.³

The legal issues surrounding the external workforce are messy, detailed, and hard to navigate. There are a number of government entities that regulate and monitor an organization's use of an external workforce. These include the Internal Revenue Service (IRS), the Department of Labor (DOL), the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB). These government agencies each have jurisdiction over, and are responsible for enforcing, different areas of the law that impact an organization's use of an external workforce, and they each provide their own recommendations and guidelines. Employment law adds an additional layer of complexity; examples include the Fair Labor Standards Act (FLSA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA). Finally, different states (e.g., California, New York, Delaware, and Illinois) have passed a variety of employment laws regulating the use and treatment of an external workforce. The result is a patchwork of laws that make compliance challenging for many organizations in the face of an ever-changing business environment.

The use of external workers of any type means the assumption of at least some business risk. Just like any other business decision, organizations choosing to use external workers must weigh the benefits and the risks and set policies and practices intended to mitigate those risks. As advocates for both employees and the employer, HR professionals must ensure that decision-makers understand the risks that poorly designed external worker policies present to productivity, engagement, recruitment, and retention of both external and internal workers. Without HR advocating for the total workforce, decisions about external workers may be based solely on single issues such as potential worst-case legal scenarios, or fiscal projections—HR must be the voice for people.

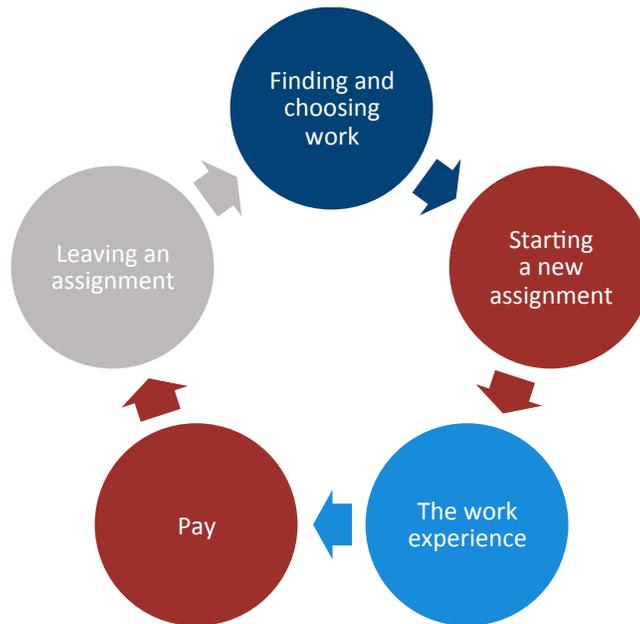
In the following sections, we provide important information and best practices that HR professionals and business leaders should be mindful of during each stage of the external worker cycle. However,

¹ SHRM, [Want Your Business to Thrive? Cultivate Your External Talent](#)

² SHRM, [Employing Independent Contractors Toolkit](#)

³ SHRM, [Minimize the Risk of Costly Misclassification Suits](#)

organizations should seek legal counsel to ensure they understand and are able to comply with all applicable laws.



FINDING AND CHOOSING WORK(ERS)

Before finding and hiring external workers, discussions between key stakeholders to determine a governance model regarding the nature of the external work, workers, and their workplace is imperative. Establishing a governance model will enable an organization to take preventative steps in mitigating possible legal issues. Foundational information that should be established includes job descriptions, tasks external workers are expected to engage in, the amount of control they have over their tasks, and the nature of their relationship with the company. Answers to these questions will guide employee classification.

Ensuring that workers are properly classified is crucial; classification determines if a company must withhold income taxes, pay social security taxes and Medicare taxes, and provide benefits, among other things.⁴ Misclassification can be exceedingly costly, as it can result in penalties for failure to properly pay the workers (minimum wage and overtime), failure to provide benefits, and failure to pay employment taxes during the period of misclassification. Our external worker model addresses different types of external workers, such as temporary workers brought in by staffing agencies, independent contractors, and many others. When it comes to independent contractors, there are a number of the important factors to consider in determining if a worker is classified as an employee or an independent contractor, including how much control the worker has in the work being done.⁵ One way to think about this is to compare your relationship with the independent contractor to your relationship with any other business you are using as a vendor. You would not exercise a significant amount of control over how another

⁴ IRS, [Independent Contractor or Employee?](#)

⁵ IRS, [Understanding Employee vs. Contractor Designation](#)

business gets its work done; it would be responsible for providing its own tools or equipment to get the job done; and so on. If your relationship with a worker doesn't resemble the way your organization interacts with other businesses, then you may need to reevaluate whether or not you have properly classified the individual, as well as examine your policies and practices to ensure you are avoiding unnecessary risk.

When we talk about temporary workers, typically brought on through a staffing agency, the big concern is always "co-employment." Mythology to the contrary, co-employment is not a violation of employment law. "Co-employment is an inherent and constructive aspect of staffing arrangements."⁶ It cannot be avoided. Co-employment occurs when two businesses exert some control over an employee's work or working conditions. It is also "a logical framework for determining which co-employers are best suited to respond to some conventional employment law problem that arises in a staffing relationship."⁶ Employers who work with their staffing agencies to avoid employment law problems shouldn't have co-employment problems.

DETERMINE TASKS

Involve HR upfront when deciding whether to meet a staffing need through independent contractors or internal employees. Consider the tasks at hand. It's generally not a good idea to bring on short-term talent to perform the organization's core functions, as opposed to work supporting individual projects. The greater the similarity between what your employees and external workers do, the greater your risk of blurring the lines.⁷ The exception to this guidance is that temporary help or short-term contract labor is often appropriate to cover duties in core functions when the person who usually fulfills those duties is away temporarily on leave and is expected to return to the position.

TEAM WITH YOUR STAFFING AGENCY

Not all staffing agencies are equal, and investing effort in finding one that suits your needs is key. It is important to interact with the staffing agency to manage co-employment risk by differentiating the primary roles of both the agency and your organization. Ensure there is communication and clarity between your organization and the staffing agency. Make sure the contract clearly defines each party's role, setting out exactly what your organization's relationship will be to both the staffing agency and to the temporary employees. Including provisions indemnifying your company from risks brought about by malicious or negligent actions by the staffing agency is also a good idea. (Your legal team is key here, as the contract language for effective indemnification differs from state to state.) Your contract should include insurance provisions requiring the agency to provide certificates of insurance for general liability, professional liability, hired and non-owned automotive, workers' compensation, crime, and cyber insurance. If you utilize temporary employees in healthcare, engineering, financial, IT, or legal roles, the agency may need additional coverage.

⁶ [Staffing Industry Analysts Co-Employment Fact Sheet](#)

⁷ IRS, [Understanding Employee vs. Contractor Designation](#)

CHECK CLASSIFICATIONS

When it comes to independent contractors, be proactive and evaluate your employee classifications routinely, and look for gaps. A common practice is to look at all the varying state and federal laws that apply to you and use the most stringent definitions and tests to ensure you are meeting the legal requirements in all jurisdictions where you have external workers.⁸ In areas where your practices do not meet the most stringent rules, ensure that they are compliant with your internal policies and that those policies have been reviewed by your legal teams and leadership for sufficiency. Remember that you can ask the IRS for a determination of worker status under IRS statute, and that worker misclassification can be corrected if you find an error has occurred.

REVIEW CONTRACTS AND POLICIES

Review contracts and policies to ensure that language and standards set in the policies are clearly aligned with worker classification. Involve your legal team or seek input from counsel. Provide them with the processes, paperwork, and plans the organization has for handling its external workforce. Use written contractor agreements containing language that helps establish the bona fides of the classification as an external worker. Remember that the contracts you have with your external workers should resemble those you have with other organizations with which you do business. (While you're reviewing contracts, make sure your legal team reviews your organization's benefits plan documents to ensure that temporary and contract workers are explicitly excluded.)

STARTING A NEW ASSIGNMENT

The next stage in the external worker cycle is starting a new assignment. From an HR perspective, this encompasses the onboarding experience of the external worker. Onboarding is often overlooked or deliberately avoided when it comes to external workers. Among a sample of external workers, less than half (44%) reported that most workplaces make a point to make them feel welcome when they begin a new assignment or project, and 11% reported that most workplaces do nothing to make them feel welcome. Similarly, less than half of HR professionals (47%) report that they have a standard onboarding process for external workers, and 11% report that they have no onboarding.⁹

Employers may shy away from offering onboarding to external workers for financial reasons or because they believe it is a preventative measure against any potential misclassification matters. However, effective onboarding is important in ensuring that workers feel welcomed and engaged, have a good impression of the organization, and feel that they are safe in the workplace. Without integration, external workers may feel disengaged or have a bad impression of the employer. One solution that organizations that routinely work with the external workforce use is to provide a separate, shortened on-boarding process for their external workers that introduces and includes external workers in the organization without providing the detailed training that regular employees receive.

⁸ SHRM, [Navigating Employment Law in the Gig Economy](#)

⁹ SHRM, [Want Your Business to Thrive? Cultivate Your External Talent](#)

THE WORK EXPERIENCE

The external worker's daily experience is one of the larger concerns for HR professionals, likely because this is when the most interactions with external workers occur and managers vary in how much they abide by the policies set forth by the organization. Employers often want to engage their external workers while also steering clear of practices that could land them in legal trouble. Questions regarding the external worker's work experience includes how external workers should be managed, trained, and how to address issues of discrimination, if they appear.

MANAGERS AND OVERSIGHT

If an organization employs independent contractors, it is important that independent contractors exercise control over their work. While organizations exercise control over *what* work is done, independent contractors typically exercise control over *how* the work is done. They also exercise control over their hours, time off, and business expenses. Control is an important factor in misclassification cases. While independent contractors shouldn't be treated like regular employees in terms of the amount of control they can exercise, they should still be expected to adhere to the organization's policies and procedures.

When organizations work with a staffing agency, there are certain responsibilities that typically fall on the staffing firm, like recruitment, paperwork, payment, and taxes. However, other tasks, like performance management, are often not consistently managed by either a staffing agency or client. In most cases, the safest option is to communicate temporary employees' performance directly to the staffing firm and to refer to the staffing firm on all personnel matters relating to temporary employees without maintaining personnel records on them. In situations where many external workers are hired from a staffing agency and spend an extended period of time with an employer, organizations may find it difficult to avoid treating them like employees. In these situations, having the staffing agency provide an on-site supervisor that is responsible for the supervision of the external workers can reinforce the reality that temporary workers are the primary employees of the staffing agency and not the client.¹⁰ Similarly, handing off particular tasks to the staffing agency, like conducting performance evaluations, delivering special recognitions, and handling terminations can reinforce that the worker's primary employer is the staffing agency.¹¹

¹⁰ [Managing Co-Employment Risk When Using a Staffing Agency](#)

¹¹ [Tackling Co-Employment Issues in IT Staffing](#)

TRAINING

One area of the worker’s experience that is particularly complicated by differing views for temporary workers and independent contractors, and across agencies is the worker’s training. According to the IRS, training a worker on how to perform their job is a form of behavioral control and is “strong evidence that the worker is an employee” — independent contractors typically use their own methods to perform tasks.¹² According to OSHA¹³, “training is a joint responsibility between organization and staffing agency and holds both the host and temporary organization jointly responsible for maintaining a safe work environment for temporary workers.” This obligation may extend to independent contractors when/if they work at an organization’s workplace rather than from their own workplace. Beyond the basics of safety, temporary workers must often be trained on their duties. In some highly-regulated industries (the financial and healthcare sectors, for instance), organizations hosting external workers are required to comply with other regulations requiring periodic training. Organizations seeking to limit their exposure can work with staffing agencies to specify agency-provided training and can reduce the need to train independent contractors by specifying that those independent contractors hold and maintain relevant professional licensure and/or certifications.

DISCRIMINATION

Another area of concern is whether the client, staffing agency, or both are responsible for handling discrimination claims. The EEOC has released detailed guidance for dealing with discrimination against external workers in the workplace. Overall, the guidance states that “a staffing firm must hire and make job assignments in a non-discriminatory manner.” Further, the client must treat the staffing firm worker assigned to it in a non-discriminatory manner, and the staffing firm must take immediate and appropriate corrective action if it learns that the client has discriminated against one of the staffing firm workers. Staffing firms and their clients are responsible for ensuring that the staffing firm workers are paid wages on a non-discriminatory basis.” More broadly, Daniel Eaton, an attorney with Seltzer Caplan McMahon Vitek in San Diego, explained in an interview with SHRM that “taking steps to provide a workplace free of harassment will never be sufficient to establish the level of control necessary to create an employment relationship with a gig worker.”¹⁴

¹² IRS, [Independent Contractor or Employee?](#)

¹³ OSHA, [Protecting Temporary Workers](#)

¹⁴ SHRM, [Navigating Employment Law in the Gig Economy](#)

PAY

WAGES

Wages and rates often vary according to the type of external worker, with independent contractors often negotiating their own salaries and the wages of temporary workers agreed upon between the client and staffing agency. Temporary workers are often paid at a lower rate than full time employees, and while this practice isn't inherently discriminatory, it does have potential to be. These workers are normally W-2 employees of the staffing agency; if an agency suggests a different arrangement, you should scrutinize it carefully, as that can be a sign that they are engaging in risky practices. Independent contractors are often paid a higher rate than full time employees in acknowledgement of their obligation to provide for their own benefits. They should be paid as 1099 contractors; using a W-2 is typically considered evidence of an employer-employee relationship. However, 1099 status alone is *not* sufficient to indicate that a worker is an independent contractor; converting pay to a 1099 without establishing any of the other conditions of independence is a common error of organizations inexperienced in the use of external workers. Organizations are cautioned that the widespread use of independent contractors can invite the scrutiny of plaintiffs' attorneys who may be eager to bring a class- or collective-action suit for unpaid overtime or minimum wage violations under the Fair Labor Standards Act (FLSA) or state wage and hour laws. If your organization has large numbers of independent contractors, especially concentrated in specific functions, your legal department should be asked to evaluate this arrangement.

BENEFITS

While benefits encompass a wide array of topics, the benefits that are often discussed in the external worker conversation include healthcare and company stocks. Host employers are often well-served by engaging staffing agencies which provide full benefits to their employees. Not only does this help cement the agency as the primary employer, it can often help equalize the compensation of external workers and internal employees doing the same jobs, reducing a potential source of friction between workers. Most external workers do not receive health insurance from their jobs, but the option of receiving or purchasing health insurance through means outside of the traditional employer is becoming more common.¹⁵ There are specific circumstances in which classes of external workers could be included in some benefits plans, but the details of those circumstances are outside the scope of this toolkit.¹⁶ One way that host employers can help external workers is to provide information about benefits brokers and/or business and employer trade associations offering insurance plans for which an external worker might be eligible. A simple way to safeguard against lawsuits for unpaid benefits is to have the company benefit plan explicitly exclude external workers. The IRS has stated that companies can use exclusionary language in their benefit plans as long as it is non-discriminatory.

¹⁵ For more information regarding external workers and the Affordable Care Act, see [Affordable Care Act and Staffing](#)

¹⁶ A detailed explanation of non-employee benefits can be found at <https://www.stephens.com/globalassets/insurance/webinars/coveringnonemployees-01.10.17.pdf>

LEAVING AN ASSIGNMENT

In discussions with HR professionals and business leaders, it became clear that few organizations do much planning for the end of an external worker engagement. Even organizations that have invested effort in the internal employee exit experience have often overlooked the external worker's exit, even though an inherent feature of using external workers is frequent and planned exits. Yet, the end of engagement is a critical stage in the external worker lifecycle. There are fewer legal perils at this stage of the external worker lifecycle, but it is not wholly without risk.

SECURITY AND SAFETY

The most fundamental task that must be completed at the end of an engagement is removing access to worksites, systems, and software that an external worker might have used during their engagement. Badges allowing building access should be returned or deactivated, systems access revoked, and, for those workers who are provided with computers and other equipment (typically, though not exclusively, temporary workers, not contractors), such equipment must be returned.

WORKER FEEDBACK

Providing feedback to external workers, even at the end of an assignment, is an area in which host employers must tread carefully to avoid misclassification or co-employment risks. When an agency-supplied worker leaves an assignment, the host organization is typically asked to provide some evaluation of that person's work to their agency employer; this is an appropriate request which allows the primary employer, the agency, to provide performance feedback to its employees. Host organizations may also keep records about the staffing agencies that they work with, noting any positive features or problems that are frequently displayed by the workers provided by that agency; keeping records on specific agency-provided workers is more of a gray area and should be evaluated with legal counsel. In keeping with the understanding that independent contractors are businesses in their own right, independent contractors may be provided with *business* references attesting to their performance in fulfilling or exceeding the terms of their contracts. These references should be consistent with the type of information you would provide for other business partners, distinct from performance appraisals that you might make of employees.

EXIT SURVEYS AND INTERVIEWS

Although exit surveys or interviews are infrequent with external workers, there is no regulatory guidance that speaks to them. Organizations are advised to develop an exit interview/survey specifically for external workers, consistent with other policies suggesting that external workers have a unique process tailored to them. Many HR professionals report that they gain valuable information about their internal teams from exit interviews with external workers; external workers frequently have experiences in many workplaces and may have the perspective to identify or even offer solutions to problems that internal workers and managers may not see.

EXTERNAL WORKER ALUMNI AND HIRING

Although only a few organizations maintain an “alumni program” for former external workers, this can be a valuable aid to future recruiting for both external and internal roles. External workers leaving an organization can be asked if they would consider future roles as external or internal workers, and contact information maintained on those who express interest. To avoid perceptions of misclassification, some organizations who maintain external worker alumni programs choose to store data and administer this program separately from any similar program that they might maintain for former internal employees. Most staffing agency contracts have stipulations regarding when and how their employees may be recruited by a host employer. It is critical that organizations follow such contract provisions. When these stipulations provide an embargo period, databases housing data on external alumni should specify the dates at which external workers can be contacted, and in what ways. As always, host employers are cautioned that converting a large percentage of external workers to internal employees is likely a greater red flag for misclassification. Organizations which find that this is their practice are cautioned to involve their legal departments and leadership in evaluating this practice for potential misclassification risk.

CONCLUSION

External workers will remain one of the most challenging issues facing businesses because of the differing legal standards between federal and state laws and regulations. HR professionals must partner with their organizational leadership and legal teams to craft external worker policies and procedures that balance risk and maximize the value of their human capital.

RESOURCES AND SUGGESTIONS FOR FURTHER READING

General Legal Considerations:

- [SHRM's Independent Contractor Resource Center](#)
- [Staffing Industry Analysts Co-Employment Fact Sheet](#)

Staffing Agencies:

- [Managing Co-Employment Risk When Using a Staffing Agency](#)
- [How to Minimize Staffing Agency Snags](#)

External Worker Classification:

- [Independent Contractor: Audit Checklist for Maintaining Independent Contractor Status](#)
- [Department of Labor Issues Guidance on Independent Contractors](#)
- [IRS Independent Contractor or Employee?](#)
- [IRS Guidelines on Determining Worker Classification](#)
 - [Publication 15-A: Employer's Supplemental Tax Guide](#)
 - Organizations or individuals can request an official determination of a worker's status under the IRS test by filing [IRS Form SS-8](#).
- [Misclassification of Independent Contractors can be Remedied](#)
- [DOL Misclassification of Employees as Independent Contractors](#)

Contracts and Policies:

- [Sample Independent Contractor Agreement](#)
- [Independent Contractor: Hiring Checklist](#)
- [Contingent Staff: Contract and Temporary Employees Policy](#)
- [Navigating Employment Law in the Gig Economy](#)

Onboarding:

- [How to Onboard a Gig Employee](#)

Discrimination:

- [EEOC Enforcement Guidance for Contingent Workers](#)
- [EEOC Enforcement Guidance: Application of the ADA to Contingent Workers](#)
- [EEOC Q&A – Enforcement Guidance: Application of the ADA to Contingent Workers](#)

Wages:

- [EEOC Informal Discussion Letter - Equal Pay Act & Wage Discrimination](#)

Benefits:

- [BLS Contingent and Alternative Employment Arrangements](#)
- [DOL Joint Employment Guidance: Consequences of Benefits Plan Eligibility](#)
- [What Benefits Can Companies Offer Gig Workers?](#)