



2024 EDITION

The Ultimate Guide to Worker Classification

This guide helps illuminate the intricacies of worker classification and provides in-depth guidance for businesses looking to mitigate their compliance risk when working with contractors at scale.

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The odds are high that you've either done some freelance 1099 work yourself or know somebody who has. The number of independent contractors increased to 60 million Americans in 2022¹—the highest it's ever been. In the tech industry alone, the percentage of job postings for contract roles jumped from roughly 6% in 2021 to 20% in 2022. The number of contractors is only expected to increase with Statista expecting 90 million freelancers in America by 2028.²

It's easy to see why businesses are eager to work with independent contractors. A variable workforce model allows companies to grow and scale sustainably without the many financial obligations inherent in a more fixed, full-time W-2 workforce—including employment benefits, administrative overhead, and FICA taxes. In a global economy defined by its frenetic pace and unpredictable nature, a nimble and distributed workforce gives businesses the ability to adapt seemingly overnight to new ideas, technologies, and opportunities.

The perilous pitfall? **Worker misclassification.** The National Employment Law Project estimates that 10% to 30% of US employers are misclassifying their workers as independent contractors³ based on the organization's analysis of state labor reports.

To protect workers and maximize tax revenue, the government fines companies seriously for misclassifying full-time employees as independent contractors. In California, businesses pay anywhere from \$5,000 and \$15,000 per violation and an additional \$10,000 to \$25,000 for repeated willful misclassification.⁴

Simply put, independent contractor misclassification can be dangerous for companies, especially those that heavily rely on contractors to generate revenue and service their customers.

This guide will help you navigate the intricacies of worker classification by providing guidelines and insights into the latest federal and state regulations. Toward the end, you'll find a comprehensive checklist for assessing your own worker classifications to help you mitigate risk and drive compliance within your organization.



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NELP NATIONAL
EMPLOYMENT
LAW
PROJECT

¹(n.d.). *Freelance Forward*. Upwork. Retrieved October 10, 2023, from <https://www.upwork.com/research/freelance-forward-2022>

²(2022, September 30). *Number of freelancers in the United States from 2017 to 2028*. Statista. Retrieved October 10, 2023, from <https://www.statista.com/statistics/921593/gig-economy-number-of-freelancers-us/>

³(2020, October 1). *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*. National Employment Law Project. Retrieved October 10, 2023, from <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>

⁴(n.d.). *Senate Bill No. 459*. California Legislative Information. Retrieved October 10, 2023, from https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=2011020120SB459





What are the dangers of misclassifying employees?

Whether or not misclassification is intentional, it comes with serious consequences for businesses. Both government agencies and employees can take legal action against your company, resulting in massive fines, significant reputational damage, and more.



FLSA violations

The Department of Labor (DOL)'s Fair Labor Standards Act (FLSA) is a federal law aimed at protecting both full-time and part-time workers against unfair labor practices. It sets standards for minimum pay, record keeping, overtime compensation, and youth employment.

Under the Act, organizations must classify their workers as either “exempt” or “non-exempt” from the FLSA’s provisions. Workers classified as independent contractors are exempt from FLSA coverage—which deprives them of labor protections, such as minimum wage guarantees and entitlement to overtime pay.

Misclassifying employees as exempt under the FLSA can lead to serious fines and even criminal prosecution. The Department of Labor will fine companies up to **\$1,000 for each FLSA violation**⁵ to compensate employees for back wages and liquidated damages. If convicted for the second time, the employer may face imprisonment.



IRS tax penalties

One of the primary consequences of misclassification is lower tax revenue due to IRS fines.

An employer is responsible for withholding and paying Federal Insurance Contributions Act (FICA) taxes on behalf of the employee—including federal Social Security taxes, Medicare taxes, and unemployment taxes. When found guilty of misclassification—and therefore, of withholding FICA taxes—the employer can be required to pay:⁶

- **A \$50 fine** for every W-2 Form the company failed to file for a misclassified worker
- A **penalty of 1.5%** of the wages paid
- **40% of the FICA taxes** the employee didn't pay and 100% of the matching FICA taxes the employer failed to pay
- **100% of the FICA and income taxes** not previously withheld from the employee in case of deliberate misclassification
- **Compensation for Social Security and Medicare** tax a misclassified employee has been paying out-of-pocket as a self-employed professional⁷

⁵ (n.d.). *Fair Labor Standards Act Advisor*. US Department of Labor. Retrieved October 10, 2023, from <https://webapps.dol.gov/elaws/whd/flsa/screen74.asp>

⁶ Peek, S. (n.d.). *W-2 vs. 1099 Contractors: Tax Differences Explained*. US Chamber of Commerce. Retrieved October 10, 2023, from <https://www.uschamber.com/co/run/finance/employee-taxes-for-w2-vs-1099-workers>

⁷ (2021, September 15). *IRS reminds business owners to correctly identify workers as employees or independent contractors*. IRS. Retrieved October 10, 2023, from <https://www.irs.gov/newsroom/irs-reminds-business-owners-to-correctly-identify-workers-as-employees-or-independent-contractors>



Uber

IRS tax penalties (cont.)

These fines can add up, especially if you engage hundreds or thousands of contractors. Just consider the ride-sharing app Uber. In September 2022, the company and its subsidiary, Rasier LLC, paid \$100 million in unpaid state payroll taxes and penalties to the New Jersey Office of Administrative Law **after being convicted of misclassifying nearly 300,000 drivers as gig workers between 2014 and 2018.**⁸



Lime

State labor violations

Along with following IRS and FLSA regulations, some states also have their own laws to supplement these rules. These state-level misclassification laws vary from state to state. In California, the scooter company Lime faced fines due to violating the state's misclassification laws. Lime classified its workers who took care of the company's scooters as independent contractors, but plaintiffs argued that under California law, these workers should be considered employees.

The lawsuit, filed under California's Private Attorney General Act (PAGA), alleged violations of California's Labor Code, including minimum wage and reimbursement provisions. **The court has approved an \$8.5 million settlement for the case.**⁹



Meta

Reputational damage

When contractors come forward to demand fair treatment, they often get wide exposure on social media and media outlets that can potentially hurt employers' images.

Meta's content moderator contractors in Austin, for example, took action in 2019 to expose their poor working conditions. They used Meta Workplace, the company's internal communication system, to share their grievances—including getting paid 14 percent of the median Meta salary, few opportunities for raises, psychological trauma from reviewing graphic posts, and restricted breaks.

After the Washington Post picked up the story¹⁰ and detailed contractors' grievances, **Meta found itself in the public eye, labeled as a tech giant that treated its contractors as "second-class citizens".** The company didn't help its cause 3 years later in 2022 when there were allegations about the mistreatment of African contractors by Meta in 2022.¹¹

⁸ Spiggle, T. (2022, October 3). *Uber Paying \$100 Million In Back Taxes Is A Positive Sign For Gig Workers*. Forbes. Retrieved October 10, 2023, from <https://www.forbes.com/sites/tomspiggle/2022/10/03/uber-paying-100-million-in-back-taxes-is-a-positive-sign-for-gig-workers/?sh=310d24c03c9e>

⁹ (2021, July 15). *Court Approves \$8.5 Million Settlement for Juicers in Misclassification Case Against Lime*. Roven, Bien, Galvan, & Grunfeld LLP. Retrieved October 10, 2023, from <https://rbgg.com/court-approves-8-5-million-settlement-for-juicers-in-misclassification-case-against-lime/>

¹⁰ 2023, from <https://rbgg.com/court-approves-8-5-million-settlement-for-juicers-in-misclassification-case-against-lime/>

Dwoskin, E. (2019, May 8). *Inside Facebook, the second-class workers who do the hardest job are waging a quiet battle*. The Washington Post. Retrieved October 10, 2023, from <https://www.washingtonpost.com/technology/2019/05/08/inside-facebook-second-class-workers-who-do-hardest-job-are-waging-quiet-battle/>

¹¹ Perrigo, B. (2022, February 14). *Inside Facebook's African Sweatshop*. Time. Retrieved October 10, 2023, from <https://time.com/6147458/facebook-africa-content-moderation-employee-treatment/>



What constitutes misclassification of workers?

To avoid misclassification penalties, companies need to follow federal and state guidelines for determining the appropriate worker classification.

Use these guidelines to determine whether workers are independent contractors or employees.

The Internal Revenue Service (IRS) distinguishes employees from independent contractors based on three factors: behavioral control, financial control, and the logistics of the worker-employer relationship.¹²

Behavioral Control The more control the employer has, the more likely the worker is a full-time employee.	Financial Control This category refers to workers' control over their work-related expenses and investments.	Type of Relationship The way the employer and worker perceive and define their relationship is the third definitive criterion for worker classification.
<p>The IRS groups behavioral control factors into four major categories:¹³</p> <ul style="list-style-type: none">• Types of instruction given. Employees receive instructions about when, where, and how to work.• Degree of instruction. Independent contractors typically work with minimal oversight, making decisions on their own.• Instructions and training. If the company provides detailed instructions and extensive training, the worker is probably an employee.• Evaluation system. Independent contractors' work is typically assessed based on project outcomes rather than routine performance reviews.	<p>The IRS considers five financial factors¹⁴ to distinguish contractors from employees:</p> <ul style="list-style-type: none">• Significant investment. Workers who make significant investments in equipment and resources needed to perform their tasks are generally contractors, but there are exceptions. Construction employees, for example, typically buy their own tools.• Expense reimbursement. Employees typically receive business expense reimbursements from employers.• Profit and loss. Because independent contractors often pay for their own resources, they have a greater chance of losing or profiting from their work than employees. The latter is generally paid a consistent salary regardless of varying costs.• Services available to the market. Contractors are free to provide their services to multiple clients simultaneously and can advertise their services to a broad audience.• Method of payment. An employee receives a regular wage, while independent contractors are paid based on project timelines.	<p>The IRS has several considerations, including whether the:</p> <ul style="list-style-type: none">• Employer-worker agreement is contractual. A written contract may specify several things, including whether a worker is an employee or contractor, but the document alone doesn't determine their classification.• Workers receive benefits. Traditional benefits like insurance, retirement plans, and paid leave are typically associated with full-time employment and aren't extended to independent contractors.• Employer-worker relationship is indefinite. Which suggests the worker is an employee.• Services provided are key activities of the business. Independent contractors often provide specialized services that are not core to the hiring party's primary business activities.

All of these factors—broken into more detailed points—make up the **20-point IRS checklist** that you'll find at the end of this guide.

¹² (2023, August 16). *Topic No. 762, Independent Contractor vs. Employee.* IRS. Retrieved October 10, 2023, from <https://www.irs.gov/taxtopics/tc762>

¹³ (2023, February 28). *Behavioral Control.* IRS. Retrieved October 10, 2023, from <https://www.irs.gov/businesses/small-businesses-self-employed/behavioral-control>

¹⁴ (2023, April 4). *Financial Control.* IRS. Retrieved October 10, 2023, from <https://www.irs.gov/businesses/small-businesses-self-employed/financial-control>



FLSA definitions

The Fair Labor Standards Act (FLSA) provides an “economic reality” test to gauge whether a worker is an employee or contractor. An employee is economically dependent on the employer, whereas a contractor has a business of their own.

But, according to the US Supreme Court, the economic reality test isn't clear-cut, emphasizing that multiple contextual factors are taken into account when determining a worker's classification. The Court holds that there are several relevant FLSA factors to consider,¹⁵ including: →

The Supreme Court also states that some factors aren't relevant to the FLSA economic reality test. The place of work, the presence or absence of a formal employment agreement, whether the worker is licensed, and the time or mode of pay all don't impact a worker's status.

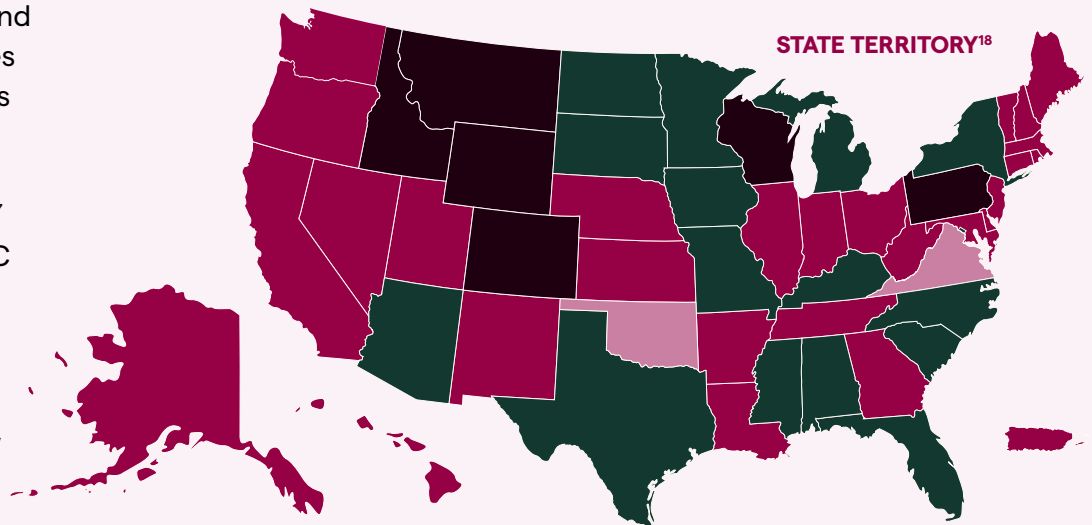
- 1 “The extent to which the services rendered are an integral part of the principal's business.
- 2 The permanency of the relationship.
- 3 The amount of the alleged contractor's investment in facilities and equipment.
- 4 The nature and degree of control by the principal.
- 5 The alleged contractor's 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.”

State misclassification guidelines

Along with the federal IRS and FLSA guidelines, many states use one of two primary tests to assess worker-employer relationships: the ABC test¹⁶ and the Common Law test.¹⁷ There are also modified ABC test versions, the A&B and A&C tests.

WORKER CLASSIFICATION TEST

- ABC Test
- Common Law
- A&C of ABC Test
- A&B or A&C of ABC Test



¹⁵ (2022, March 1). Fact Sheet 13: *Employment Relationship Under the Fair Labor Standards Act (FLSA)*. US Department of Labor. Retrieved October 10, 2023, from <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

¹⁶ Smith, A. (2021, May 19). *Independent-Contractor Classifications May Need to Be Reviewed*. SHRM. Retrieved October 10, 2023, from <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/independent-contractor-classifications-reviewed.aspx>

¹⁷ (n.d.). *Employee (Common-Law Employee)*. IRS. Retrieved October 10, 2023, from <https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee>

¹⁸ (2019, October 25). *Employee or Contractor? The Complete List of Worker Classification Tests By State*. Wrapbook. Retrieved October 10, 2023, from <https://www.wrapbook.com/blog/worker-classification-tests-by-state>

The ABC test consists of three criteria that must all be met for a worker to be considered an independent contractor:

- ✔ The worker is free from the control and direction of the hiring entity.
- ✔ The worker performs services that are outside the usual course of the hiring entity's business.
- ✔ The worker is engaged in an independently established trade, occupation, or business that is similar to the services they are providing.

The Common Law test evaluates multiple factors to determine worker classification, with no single

factor being decisive. This test is essentially the same as the IRS guidelines.

Along with considering these tests, check whether your state has unique civil law statutes regarding labor that impact classification. California, for example, has its own labor code, which was the basis of the Lime scooter misclassification fine mentioned earlier.

States also have varying fines for misclassifying employees. For instance, in Texas, misclassification fines start at \$200 per worker,¹⁹ while Michigan employers can expect a fine of around \$1,000,²⁰ imprisonment for up to a year, or both.



How have worker classification laws changed in recent years?

Perhaps the biggest challenge of staying compliant with classification laws is that they change frequently—both on federal and state levels.

TWO FACTORS

the degree of control a company has over the individual's work

AND

the person's opportunity for profit or loss

Federal changes

The current Independent Contractor Rule²¹ published in January 2021, states that someone is an independent contractor based on two factors: the degree of control a company has over the individual's work and the person's opportunity for profit or loss.

The US Department of Labor (DOL) has been repeatedly delaying²² the finalization of a new independent contractor rule suggested in October 2022. While the 2021 IC Rule is considered more employer-friendly, the new rule should broaden the economic realities test's scope and offer more detailed guidelines for determining the employee-employer relationship.

¹⁹ (n.d.). *Classifying Employees & Independent Contractors*. Texas Workforce Commission. Retrieved October 10, 2023, from <https://www.twc.texas.gov/programs/unemployment-tax/classifying-employees-independent-contractors>

²⁰ Kaufman, J. E. (n.d.). *Employee Misclassification And Michigan Workers' Comp: What You Need To Know*. Michigan Workers Comp Lawyers. Retrieved October 10, 2023, from <https://www.workerscompplawyerhelp.com/blog/2021/10/employee-misclassification/>

²¹ (2021, January 7). *Independent Contractor Status Under the Fair Labor Standards Act*. Federal Register: The Daily Journal of the United States Government. Retrieved October 10, 2023, from <https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act>

²² Cardman, M. (2023, June 15). *August 2023 Is Latest Target for DOL's Overtime and Independent Contractor Rules*. XperTHR. Retrieved October 10, 2023, from <https://www.xperthr.com/news/august-2023-is-latest-target-for-dols-overtime-and-independent-contractor-rules/52472/>

State changes

In recent years, different states and cities have also undergone significant changes in their worker classification laws, adding an extra layer of complexity for businesses operating across multiple jurisdictions.

These are just some examples of the most recent updates in contractor classification regulations by state and city:



California Assembly Bill 5 (AB 5).²³

The bill, which came into effect on January 1, 2020, introduced the ABC test for determining worker classification in California. The new test makes it more challenging for companies to classify workers as independent contractors, particularly in industries like ride-sharing and food delivery.



The Freelance Worker Protection Act (FWPA) in Illinois. ²⁴

Designed to protect contractors, this law takes effect on July 1, 2024. The FWPA ensures that once a freelance worker starts their contracted services, the hiring party can neither delay payment nor offer less than the agreed-upon compensation.



Seattle's new Independent Contractor Protections.²⁵

The City of Seattle's Independent Contractor Protections Ordinance (ICPO) took effect on September 1, 2022. It safeguards independent contractors from payment delays or non-payment while also ensuring they possess comprehensive knowledge of their work agreements.

²³ (2023, April 11). *Worker classification and AB 5*. State of California Franchise Tax Board. Retrieved October 10, 2023, from <https://www.ftb.ca.gov/file/business/industries/worker-classification-and-ab-5-faq.html>

²⁴ Berry, T., Dishman, N., & Salazar, K. (2023, September 18). *Illinois Enacts Freelance Worker Protection Act*. SHRM. Retrieved October 10, 2023, from <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/illinois-freelance-workers.aspx#:~:text=Illinois%20recently%20enacted%20broad%20protections,effect%20on%20July%201%2C%202024.>

²⁵ (n.d.). *Independent Contractor Protections Ordinance*. Seattle Office of Labor Standards. Retrieved October 10, 2023, from <https://www.seattle.gov/laborstandards/ordinances/independent-contractor-protections->



3 frameworks to assess your worker classification protocols

Classifying your workers properly is crucial to avoid legal and financial risks. The following three questions should help you assess your worker classifications and ensure compliance.

1 Do my worker classifications align with the IRS and FLSA definitions?

When assessing worker classification under the IRS rule, pay special attention to the first two degrees of control: behavioral and financial control. While the third degree of control, the relationship between the parties is undoubtedly a consideration in determining worker classification, the first two factors are more important.

And what about FLSA compliance?

While the IRS rule primarily examines degrees of control, the FLSA introduces the economic reality test.



Let's take a case involving a worker named Alex, who provides graphic design services to a marketing agency called CreativeEdge

To assess compliance with the FLSA, a lawyer or agency would consider the following factors (as outlined by the Supreme Court):

- **Extent of integration:** If Alex's work directly contributes to the agency's core marketing activities, it suggests an employee-employer relationship under the FLSA.
- **Permanency of the relationship:** If Alex consistently works on multiple projects for the agency over an extended period, they have a long-term working arrangement that suggests they're an employee.
- **Investment in equipment:** Alex is likely an independent contractor if they use their own computer, software, and design tools.
- **Nature and degree of control:** If CreativeEdge provides specific instructions on how to complete design projects and maintains significant oversight, Alex is likely an employee.
- **Opportunities for profit and loss:** If Alex can earn more by taking on additional projects or securing new clients, that's a sign they're an independent contractor.
- **Initiative, judgment, or foresight:** Alex is likely a contractor if they operate independently and compete with other designers in the open market.
- **Degree of independent business operation:** Alex is likely a contractor if they have their own client base, market their services, and manage their workload.

Worker classification under IRS and FLSA guidelines depends on evaluating various factors, with no single criterion determining the outcome. Always consider the full scope of circumstances, as the worker classification is based on the interplay of these factors and the unique context of each case.



2 Do my worker classifications align with my state's regulations?

To check whether your worker classifications align with local rules, consult your state's labor department website or seek legal advice.

For instance, in California, the ABC test²⁶ applies. To be classified as an independent contractor, the worker must be:

- ✓ Free from the control and direction of the hiring entity.
- ✓ Performing a job that is outside the usual course of the hiring entity's business.
- ✓ Engaged in an independently established trade, occupation, or business.

3 Am I using technology to mitigate compliance risks?

Many companies relying on independent contractors use slow, laborious processes to manage these workers. But, this manual work is time-consuming and invites errors—two factors that can increase risk and the likelihood of misclassifications. It's easy to miss IRS deadlines and submit 1099-NEC forms with inaccurate information when administering these critical processes through human touch points—as opposed to implementing automation with specific and algorithmic-driven process adherence.

Businesses that use AI and automation to manage data-intensive processes significantly reduce compliance risks associated with human error. Find a tool that lets you set up automatic workflows for regular contractor management tasks—like requesting W9 forms and sending payments—all while staying compliant.

²⁶ (n.d.). *ABC Test*. California Labor & Workforce Development Agency. Retrieved October 10, 2023, from <https://www.labor.ca.gov/employmentstatus/abctest/>

²⁷ (n.d.). *About Form 1099-MISC, Miscellaneous Information*. IRS. Retrieved October 10, 2023, from <https://www.irs.gov/forms-pubs/about-form-1099-misc>

²⁸ (n.d.). *About Form W-9, Request for Taxpayer Identification Number and Certification*. IRS. Retrieved October 10, 2023, from <https://www.irs.gov/forms-pubs/about-form-w-9>

Worker Classification Checklist

Working with a contingent workforce empowers businesses to grow sustainably without the costs and overhead of a full-time workforce. But it also comes with some risk: worker misclassification.

This checklist aligns with the IRS guidance for determining employee/contractor status. *It isn't a substitute for legal advice but rather a resource to enhance your understanding of worker classification.*

Your worker is most likely an independent contractor if...

- The worker can make a profit or suffer a loss as a result of the work, aside from the money earned from the project **(5 points)**.
- The worker has invested in the equipment and facilities used to do the work **(5 points)**.
- The worker provides services to more than one company at a time **(5 points)**.
- The worker's services are available to the general public **(5 points)**.

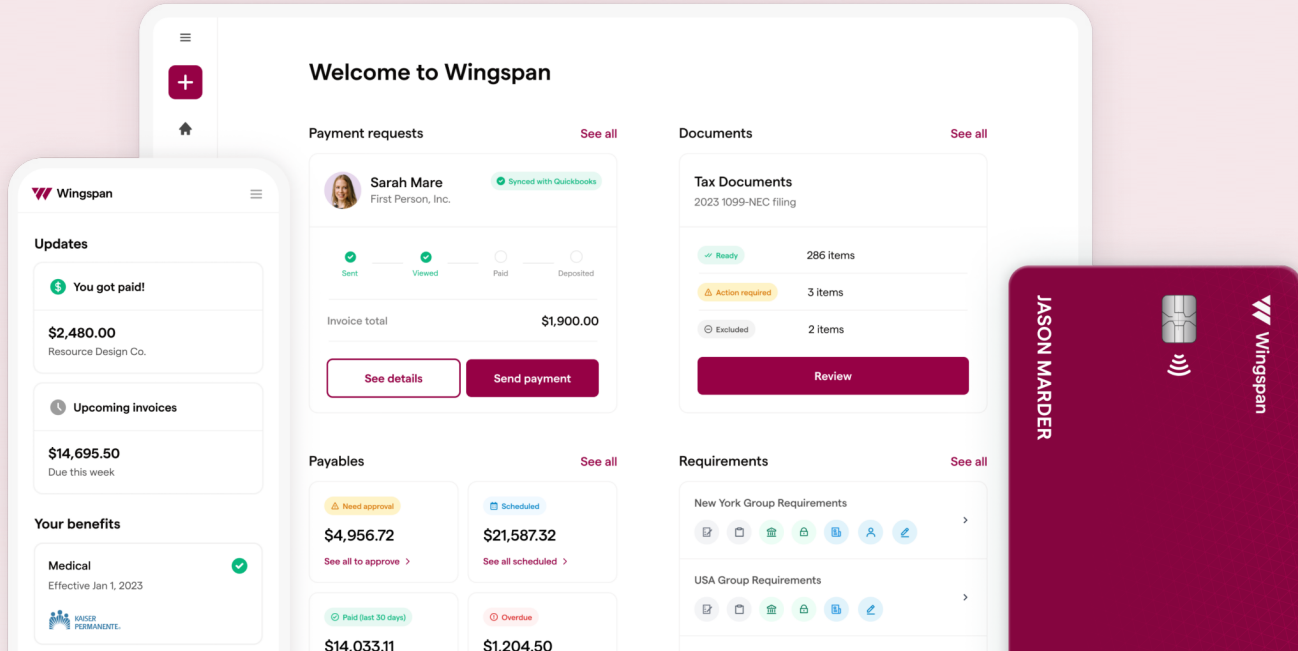
If you scored 10 or more, the IRS may classify your worker as an independent contractor.

Your worker is most likely an employee if...

- You instruct the worker about when, where, and how they should work **(2 points)**.
- The worker receives training on-site to get the lacking skills **(2 points)**.
- The worker is expected to deliver work personally **(2 points)**.
- The worker and their services are integrated into the company's structure **(2 points)**.
- The worker has the authority to hire and manage employees on behalf of the company **(2 points)**.
- Your company has a continuous relationship with the worker **(2 points)**.
- The worker follows set work hours **(2 points)**.
- The worker performs a full-time job **(2 points)**.
- The worker must work on your company's premises **(2 points)**.
- The worker performs work in a sequence pre-defined by the company **(2 points)**.
- The worker must provide written or oral reports to the manager **(2 points)**.
- The worker gets paid regularly with consistent amounts of money **(2 points)**.
- You compensate the worker for work travel **(2 points)**.
- You can fire the worker **(2 points)**.
- The worker can quit at any time without liability **(2 points)**.

If you score more than 14, the IRS is most likely to classify your worker as an employee.

Request a free compliance audit with Wingspan to assess your misclassification risks and classify your contractors with increased confidence. To learn more, visit www.wingspan.app.



Classify your 1099s with confidence

Contractors are a revenue driver for so many businesses today. If that's true for your company, don't let regulatory complexities stand in the way of engaging these independent workers and giving your business a competitive edge.

First and foremost, consult with your in-house counsel or external legal experts to ensure full compliance with the law. Worker classification is a nuanced and context-dependent process that requires detailed legal expertise.

But as you seek legal advice, you can also build

your own knowledge of worker classification rules so you can confidently work with contractors. Use the worker classification checklist as a starting point for your evaluation, and regularly return to this guide for an overview of IRS, FLSA, and state guidelines.

Our team is also happy to help you evaluate your existing processes and navigate the complexities of 1099 classification. Request a free compliance audit with Wingspan to assess your misclassification risks and classify your contractors with increased confidence.

Wingspan is the first payroll platform purpose-built for contingent work. Bill clients, onboard and pay workers, and stay compliant — all in one place. To learn why finance and operations leaders are raving about Wingspan, visit www.wingspan.app.



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