

Is it time to convert employees into independent contractors?



Are more independent contractors in your organization's immediate future? The fact is that right now may be the best time to hire more gig workers – or convert teleworkers. The employees you sent home during the early days of the pandemic now look more like independent contractors than ever. And those you laid off may be interested in a new relationship as they struggle with childcare and school closures. Selling them on a true independent contractor status may not need much persuasion. But employers have to structure these potential new relationships just right to avoid lawsuits and agency second-guessing.

Recalling laid-off workers

During shutdowns, many employers laid-off workers when demand fell. Others cut hours. Still, others switched to teleworking arrangements. Employers and employees widely expected that once governors allowed non-essential businesses to reopen, workers would be back in the office. But that hasn't universally happened.

As the pandemic ebbs and flows, organizations naturally are a bit leery of rehiring workers. It's still unclear when things will return to "normal" and whether the demand for goods and services will be steady. Instead of recalling workers and then having to lay them off again if demand falls, consider offering gig worker independent status. That way, you retain the ability to scale up or down as conditions change on the ground. You won't have to worry about work surges and overtime or cutting hours during lulls.

Those employees you laid off who could return as teleworkers could be offered independent contractor telework. But even those who must be physically present to work could be rehired as gig workers. While more difficult to establish when workers are on site, it *is* possible. Just make sure that you restrict the actual performance of the work as little as possible. Control is key. The more control you impose on doing the job, the more likely the worker will be deemed an employee.

Telework works

If there's one thing the COVID-19 pandemic has shown employers, it is that *many* jobs can be performed perfectly well from home. Despite obvious obstacles like the sudden shift from office to home without planning, the experiment has been successful. In a [recent survey](#) conducted by the New York Times, 86 percent said they were satisfied working from home. Twenty percent, though, wanted to return to the office. This creates an opportunity to offer telework as an independent contractor *or* a return to the office as an employee. By offering a choice, employers show they aren't forcing independent contractor status.

There are a few compelling reasons to consider the switch such as:

- Fewer costs for facilities like office space
- Lower costs for benefits and taxes
- Flexibility to scale the workforce up or down depending on business needs
- Far fewer problems with time tracking and wage and hour rules

However, employers have to make sure that they don't run afoul of state and federal rules about who exactly is an independent contractor.

Before you think about implementing the big changes creating independent contractor relationships will bring, consider whether your teleworking employees are doing so successfully. Upwork, an organization that has long championed telework, conducted a U.S. based survey during April 2020.

[Upwork surveyed](#) 1500 hiring managers and executives and found that:

- Half of the surveyed workforce worked from home;
- 56% of hiring managers felt that the shift to remote work has gone better than expected;
- 10% felt it has gone worse than expected;
- The greatest perceived benefits of remote work include a lack of commute, fewer unnecessary meetings, and reduced distractions;
- The single biggest drawback was technological problems; and
- 9% of hiring managers said their workforce will be more remote going forward.

Solving telework problems with independent contractors

There are problems with telework – many that could be solved with creating independent contractors. These include:

- **Tracking time.** Under the Fair Labor Standards Act (FLSA), employers are required to keep accurate time records for all hourly employees. There's no exception for those that work from home. But tracking almost every minute teleworkers work can be very tricky given that managers aren't around to observe. Some employers rely on software to track when work's being performed, but that's not foolproof. Nor does it always capture time spent preparing to work and shutting down. And the stakes are high. Miss hours worked and the amount owed doubles. Plus, there's a chance that a class or collective action lawsuit may push that figure far higher. While the U.S. Department of Labor (DOL) has recently indicated that they are taking a somewhat lenient view of hours worked, including allowing flexible telework schedules that

account for breaks for childcare, employers still must pay for all time spent working. That's incredibly hard to do.

- **Accounting for overtime:** The FLSA also requires that employers pay nonexempt workers time and a half for hours over 40 during any workweek. But it's hard to monitor extra hours spent working at home. Employees may put those hours in without telling their supervisors.
- **Retaining exempt status:** Employers don't have to track all time spent working when the teleworker is exempt. But what happens when an exempt teleworker's job changes during her stint at telework? Right now, employers are reinventing themselves in response to market changes. That may mean the teleworker who started out as exempt no longer fits neatly into his exempt classification.
- **Managing different state laws:** Another practical telework problem is the teleworker's location. If your employee decamped to another state, that may mean you have to comply with a whole new set of state employment laws.
- **Paid FFCRA leave:** Under the Families First Coronavirus Recovery Act (FFCRA), most employees are entitled to paid leave off when childcare centers and schools close due to COVID-19 infections. Up to 12 partially paid weeks are available. Teleworkers are also covered if they can show that they must care for children under FFCRA. Leave may also be available intermittently. Naturally, trying to manage teleworkers who with childcare responsibilities isn't easy for employers.

Converting employee to independent contractor status

One way to eliminate the problems highlighted above is to change the teleworker's relationship from employee to independent contractor. Tracking hours no longer matters. Nor does paying overtime. Benefits shift from your responsibility to the contractor. Exempt status becomes irrelevant. And as long as you draft an independent contractor agreement that chooses the state whose laws apply, the teleworker's resident state doesn't matter.

One word of caution: Expect one or more state or federal agencies to scrutinize your agreement. Here are some tips that maximize the probabilities the agreement will stick:

- **Offer choice:** You can ask the employee to convert or come back into the office as an employee. This clarifies that the employee has a choice.
- **Explain independent contractor benefits:** Make sure workers understand the potential benefits of independent status. For example, tout that contractors can work around their children's schedules during COVID-19 and beyond. Suggest there will be opportunities for additional work with other companies. Sell work-life balance and schedule control.
- **Encourage outside work:** A key factor in being an independent contractor is that the worker is free to choose other assignments with other companies. Spell out that right in the agreement. Employers that insist independent contractors only perform work for their company risk having the workers deemed employees.
- **Equipment:** A sign that someone is a true independent contractor is that he or she owns the equipment and tools necessary to complete jobs. Make sure that's the case for teleworkers. Likely, many of your teleworking employees are already using their own equipment. For those that are using their company's, it makes sense to sell or give the equipment to them on conversion. Alternatively, take the equipment back and have your new independent contractors purchase replacements. If you lease or provide a purchase plan, make sure there are no strings attached once the purchase is complete.
- **Tracking time:** Resist the urge to set time requirements. Independent contractors should control when they perform their jobs as much as possible. Instead, set deadlines and provide a list of deliverables instead of requiring core hours.
- **Invoicing:** Rather than paying by the hour, require invoicing for completed work.

Final note: States have their own requirements for what constitutes an independent contractor or gig worker. Some have redefined employee and independent contractor. While the current federal administration has

signaled that it considers many gig workers true independent contractors, many states disagree. That's a compelling reason to have counsel approve any conversion plan before implementing it.