

## Growing your global workforce through contractors

"If you can't figure out the employee thing, just hire an independent contractor." This is a common refrain for companies looking to expand into other countries. While hiring a contractor may seem like a quick and easy way to get an individual on the ground, failing to structure and document the contract properly can create issues that could come back to haunt your company.

This article provides an overview of some of the key issues to consider when engaging contractors outside the US.

### Could your contractor be misclassified?

Misclassification risks arise when a worker is engaged as a contractor but in fact should have been engaged as an employee under the requirements of local law. The good news is that the law regarding contractor misclassification is quite similar around the world. The hallmark of an employer-employee relationship is "control," ie, how much control does the company have over the individual's performance of the work? The way the company "labels" the individual or how the relationship is documented in an agreement is not relevant; the key to the analysis is the actual treatment of the individual in the workplace. For an overview on misclassification issues in the US, please see our article [here](#). Your worker may be neither an employee nor a contractor.

In some countries, the distinction between employee and contractor is not a binary one – and a hybrid model may be in play.

For example, in the UK, the hybrid model is called "worker." "Workers," like contractors, have flexibility in terms of how they work with a company. The company does not have to offer them work and they do not have to accept the work. In other words, they may work only when they desire. However, if they are not in business on their own, if they cannot send someone else to do the work, and if their work remains under the supervision or control of the company, then they are likely to be treated as "workers" rather than contractors. Under UK law, "workers" enjoy some but not all employment rights, including rights against discrimination, minimum wage, paid holiday and rest breaks.

Canada, Italy and Spain have similar intermediate or hybrid statuses. In Canada, the hybrid status is called "dependent contractor;" the key factor in distinguishing a contractor from a dependent contractor is whether the relationship is exclusive in the sense that the worker works only for one company. In Italy, there is a similar hybrid status called co-co-co (continuous and coordinated collaborator). In Spain, such a hybrid status is called Trabajador Autonomo Economicamente Dependiente (TRADE).

### What is the exposure for misclassification?

The legal exposure for misclassifying employees (or workers) as independent contractors is two-fold:

- a. Liability vis-à-vis the individual in relation to rights, entitlements and protection under local employment law:
  1. Minimum wage, overtime compensation, benefits from the local social security system, etc.
  2. Termination/statutory severance, which is available in many foreign countries for rank-and-file employeesIn many jurisdictions, it is possible to pay the required, or, where possible, negotiated, amounts to individuals in exchange for a release of claims. However, in some jurisdictions, like Brazil, releases may not always be enforceable.

b. Liability vis-à-vis the government:

1. for failure to withhold payroll taxes
2. for failure to make social insurance contributions.

Compared to liability vis-à-vis the individual, liability vis-à-vis the government is more difficult to address. The only way to address liabilities owed to the government is to self-report and pay overdue taxes and social contributions. While flaunting government liability is rarely a good idea, the reality is that many companies assess the need for self-reporting in light of the risk of government enforcement in a given jurisdiction. While a decision to not self-report may result in short-term relief, it rarely results in a long-term solution, particularly when a company may be looking forward to a potential acquisition or investment where these liabilities may be a red flag.

## Are there special local law requirements for engaging contractors?

Assuming you have gone through the list above and feel comfortable engaging the individual as a contractor, in the US, you may believe your analysis is at an end. Outside the US, not so fast. Some countries have unique requirements with respect to contractors:

Requirement	Example countries
Registration requirement for the contractor	Brazil, France, Israel, Canada
Tax withholding, social, VAT, sales tax withholdings	Japan, Canada, the European Union (depending on the structure of the arrangement and contracting parties)
Applicability of commercial agents directive (if applicable, the issue is whether appropriate termination compensation is paid)	European Union
Some jurisdictions may not recognize the concept of independent contractor	China

## What documents are needed to hire an international contractor?

Whatever you do, do *not* use your US form independent contractor agreement **without adjustments**.

If the hiring company is the US entity, consider including language to address the following in your agreement with a non-US contractor:

1. Minimize risk of corporate tax exposure by expressly stating that the contractor is not authorized to make any representation, contract or commitment on behalf of the company and that the contractor is prohibited from representing to anyone that the contractor has such authority.
2. Make the contractor responsible for his/her personal income tax, social contribution and tax reporting obligations.
3. Require that the contractor comply with US and local anti-corruption/anti-bribery laws.
4. If there is an exclusive jurisdiction clause, retain the right for the company to seek injunctive relief in the jurisdiction



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where the contractor performs services.

While most jurisdictions will recognize US style agreements with US choice of law / forum, it is always safer to check with your legal advisors as some jurisdictions have their own peculiar rules that should be followed.

If the hiring entity is a non-US entity, then a local-style independent contractor agreement should be used to make sure local law requirements (including tax and IP requirements) are addressed and the company's interest is sufficiently protected.

## Final words

The world is not black and white, nor is the issue of engaging contractors outside the US. As much as global expansion is exciting, companies should understand potential legal pitfalls and work with counsel to anticipate issues at the beginning of the process to form a strategy (from entry to exit) that works for their own business.

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