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A Checklist for Contingent Worker Risk

CONTINGENT WORKFORCE INSIGHTS
US EDITION

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Introduction

Risk is one of the most talked about but least understood topics in contingent workforce management.

Building a framework for effective risk management requires solid cooperation between an organization's HR, legal and procurement teams, along with training and support for individual hiring managers who tend to be the front line of day to day decision making.

This setup has the potential to create confusion and result in poor execution when risk issues arise.

In this paper, Procom provides a framework for thinking about the risks that organizations can face in their contingent workforce programs. There are also helpful checklists for each theme highlighting the issues to consider when designing, managing and evaluating a contingent labor program that incorporates best practices.

Defining the Risk Vocabulary

Procom recognizes seven broad risk categories for contingent labor. They are:

- Worker misclassification
- Criminal behaviour
- Counterparty risks
- Employer standards compliance
- Code of conduct
- Financial irregularities
- Co-employment

Good risk management starts with a shared language about each risk the organization faces.

This allows the team to work together to develop effective policies, processes and training. Equally important is clearing out some of the fear, uncertainty and doubt that exists around various risk topics, and taking an objective fact-driven approach on the likelihood of certain risks occurring and the organizational impact they will have.

Many organizations have never experienced adverse event in their contingent labor program, but that doesn't mean there is no risk, or that time spent on risk reviews, planning and mitigation efforts have been wasted.

The Risk Spectrum

Risks vs Costs



Worker Misclassification

Misclassification happens when a company incorrectly identifies the relationship that exists between them and the contingent worker. This serious mistake can result in hefty penalties for the company and back payments to the worker.

Most organizations focus exclusively on 1099 or independent contractor classification however there are other important classification influencers

such as overtime eligibility (Fair Labor Standards Act (FLSA) classification) and position classification for workers' compensation coverage.

Checklist

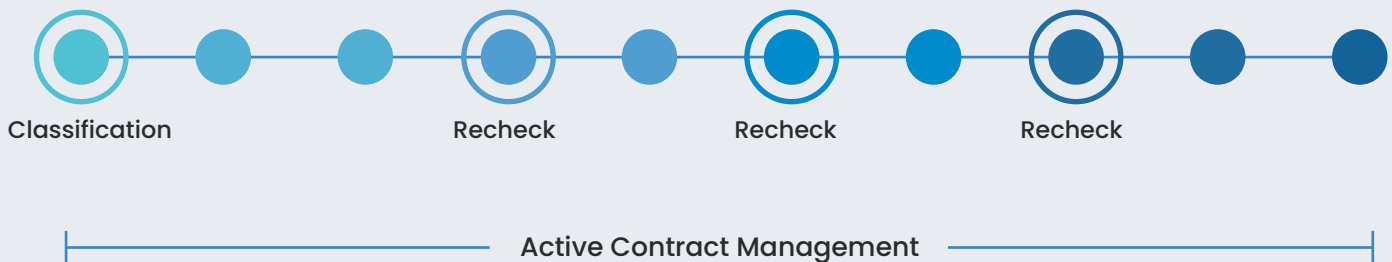
- ☐ 1099 classification
- ☐ Overtime/FLSA classification
- ☐ Workers' compensation classification

Rechecking Classification

While classification is primarily an onboarding activity, organizations must be vigilant to ensure the status of the relationship does not change over time and invalidate the original classification. To ignore this may result in future reassessments and penalties for the company.

► Onboarding

Offboarding ◀



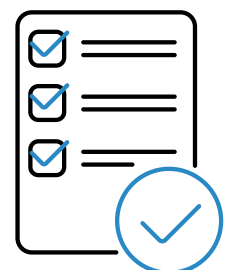
Criminal Behavior

The temporary nature and fast pace of contingent labor makes it vulnerable to abuses and unethical behavior.

Typical attacks center on frauds or kickbacks that compromise the integrity of the candidate selection process, and/or financial frauds that target the company's invoice payment process.

Checklist

- ☐ Resume fraud
- ☐ Reference fraud
- ☐ Financial fraud
- ☐ Identity fraud
- ☐ Bribery/kickbacks



Counterparty Risks

A firm's overall strategy for contingent labor often includes a network of direct and indirect suppliers. This can result in 2nd and 3rd level counterparty risks that are unseen in traditional employee/employer relationships.

Procom defines counterparty risk as: solvency risk, inherited liability from weak operational controls, and vicarious liability from poor compliance with labor laws.

Counterparty risk can be difficult to identify. It is often viewed as an extension of all of the other risk categories, except the company is vulnerable to the actions and governance habits of its counterparties. As a result, the company is indirectly responsible when the counterparty's safeguards break down.

Checklist

- ☐ Liability for unpaid/improperly paid wages or payroll taxes
- ☐ Risks due to financial solvency of supplier
- ☐ Vicarious liability for prohibited employer practices and/or improperly executed HR processes (improper termination, discrimination, etc.)
- ☐ Shoddy operational practices (unenforceable contract agreement templates, incomplete records, unlawful background checks, etc.)
- ☐ Improper management of mandatory workplace certifications (expired/revoked professional licenses, safety certificates, etc.)
- ☐ Expired or invalid insurance requirements (workers' compensation, liability, etc.)

Employment Standards Compliance

This risk arises when an organization is assessed based on its failure to comply with employment standards obligations. If the organization is deemed to be the employer of record for its contingent worker(s), fines and other penalties can and often do apply.

Specific risks and liability vary based on applicable state and federal legislation, but payroll tax compliance, overtime compliance and liability for termination pay are all hot button issues that require special attention.

This is especially true following a recent trend for 'joint employer' obligations between clients and their vendor firms.

It's important to note that many of these items overlap with the obligations an organization already manages with its own employee workforce. This specifically applies to issues arising through vicarious liability to its contractor workforce, or problematic interactions between its employee and contractor workforces.

Checklist

- ☐ Wage and hour claims (Fair Labor Standards Act)
- ☐ Workplace discrimination or harassment (Equal Employment Opportunity Commission, Americans with Disabilities Act, Equal Pay Act, etc.)
- ☐ Protected leaves (Family and Medical Leave Act, etc.)
- ☐ Workplace safety (Occupational Health & Safety Act, etc.)
- ☐ Improper background checks
- ☐ Wrongful discharge/termination (typically state labor legislation)
- ☐ Reclassification liability (1099/Independent Contractor status reversal, etc.)
- ☐ I-9 form/employment eligibility compliance
- ☐ H-1B foreign worker program visa compliance

Code of Conduct

On-assignment conduct refers to damages arising from the conduct of internal managers, or the conduct of the contingent workers themselves while on assignment.

Code of conduct issues are especially sensitive, as the incorrect actions of business managers could expose the organization to risks that fall under other topics, such as misclassification or employer of record obligations.

Given this dynamic, it is critical for organizations to have clear training, operational processes and escalation methods to address these types of issues when they arise (or engage a vendor with sound practices to do so on their behalf.)

Checklist

- ☐ **Workplace injuries:** Who is responsible? Who pays? Were health and safety policies followed?
- ☐ **Workplace accidents/damages:** Who is responsible? Who pays? What are the insurance considerations?
- ☐ **Contractor performance problems.** Best way to address incidents of poor performance by contractors.
- ☐ **Assignment disputes.** Who resolves assignment disputes, including scoping, resourcing and deliverables issues?

Financial Irregularities

The repetitive, high transaction volume of most contingent labor relationships makes it vulnerable to many financial irregularities. These can include accidental double invoicing mistakes or more calculated invoice inflation or overbilling schemes.

An organization's regular financial controls play an important role in risk management. When it comes to contingent labor, monitoring the many influences can be challenging and requires specialized skills for effective management.

Checklist

- ☐ Duplicate invoicing
- ☐ Timesheet/invoice inflation
- ☐ Early deliverables billing
- ☐ Expense claim inflation
- ☐ Rate card compliance/job description inflation
- ☐ Purchase order/end date enforcement



Co-employment

Co-employment risk is the term used to refer to situations where two or more organizations exert some level of control over a worker, and are therefore considered to have employer obligations toward the employee. Co-employment risk can often exist when organizations use staff that are provided by third parties.

This concept is captured under the legal term of 'Joint Employer' and can arise under a variety of situations including misclassification/reclassification of the legal relationship to an independent contractor, as well as situations involving the assigned personnel (employees) of a temporary help or staffing agency where the client controls significant aspects of their work.

Potential obligations that arise under a co-employment situation could include statutory remittances (such as income tax), responsibility for workplace safety obligations, payment of employee entitlements (such as sick pay, vacation pay and/or overtime), as well as termination compensation and other items.

Specific risk drivers of incurring co-employment liability depend on the facts of a given worker relationship and the practices of your supplier, evaluated in the context of applicable state and/or federal legislation (FLSA, NLRB, EEOC, FMLA and OFCCP all potentially apply).



Conclusion

Risk is an important but tricky issue in contingent workforce programs. Effectively managing contingent program risk requires a collaborative approach between client stakeholders, ranging from procurement, legal, HR and business managers.

A comprehensive approach will start with a risk assessment, followed by crafting a framework of robust policy and process controls, effective front line training, and assigning a dedicated team of specialists to manage routine contingent worker transactions (onboarding, etc.), as well as critical escalations (terminations, responding to performance problems, etc.)

Having a model to identify risk issues and plan mitigation strategies is an important first step for any effective risk management program. It's critical to have an open conversation between all program stakeholders and external suppliers of contingent workforce services.

Procom also highly recommends establishing a well funded contingent labor program office with dedicated legal, HR and procurement support. This creates a platform to establish true risk management measures that are grounded in sound operational practices, and shared values across all stakeholders.



Procom is an award winning provider of talent acquisition and contingent workforce management services to enterprise organizations across North America.

We are committed to establishing trust in our relationships, creating long-term value and consistently delivering creative and innovative solutions.
