

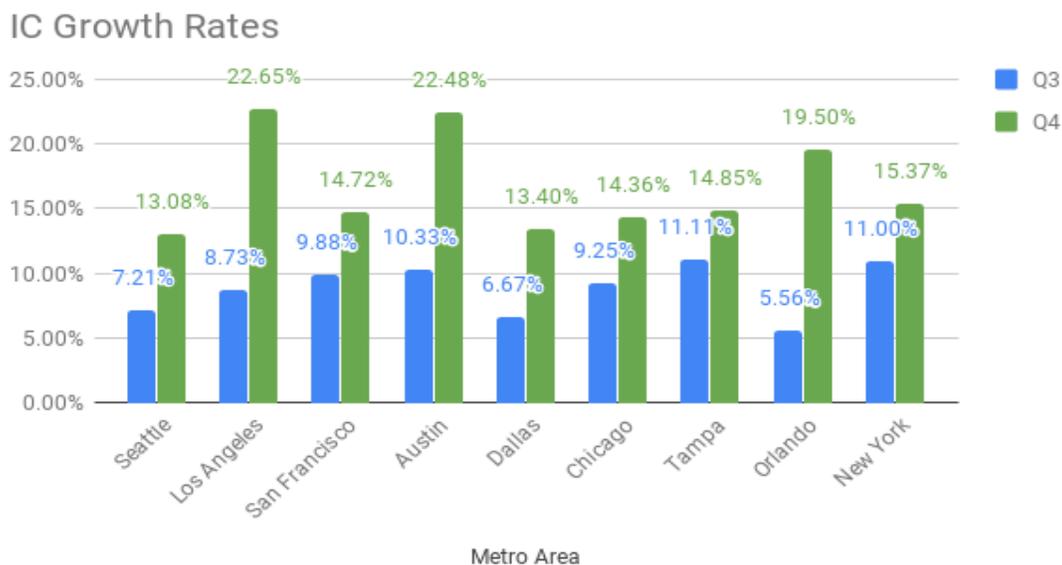
Independent Contractors: A Rising Presence in the Workforce

EXPONENTIAL INCREASES IN INDEPENDENT WORK

Over the past decade, the ratio of independent contractors to full-time employees has meaningfully risen. No reliable economic labor data suggests that this trend will slow any time soon.

By the best estimates, there are nearly 15.5 million¹ independent contractors in the United States, with another 56 million Americans choosing to freelance. The dramatic spike in growth for independent contracting depicts a profound glimpse at the future of work – and resembles a landscape populated by independents, freelancers, and “micropreneurs.”

Chart 1 – Data Sources: U.S Census, BLS, Treasury Department



The problem? Employment misclassification cases have matched the momentum, increasing by more than 30%. To innovate, contain overhead, and operate nimbly, businesses have expressed a high demand for freelancers, independents, and gig workers. But because of the unfamiliarity of these arrangements or the fear of reprisals, they hesitate to move forward. And most staffing industry firms have precluded independent contractor programs from their offerings, also to avoid the associated risks.

¹ "Contingent and Alternative Employment Arrangements News Release," USDL-18-0942, U.S. Bureau of Labor Statistics, 2018

Understanding the Risks and Issues

For many organizations, the use of independent contractors (ICs) has proven to be an attractive alternative to other labor fulfillment approaches, but without a sound evaluation process that includes a comprehensive risk-mitigation strategy, it can leave an organization open to legal and financial risk. Improperly classified 1099 contractors can result in IRS penalties, back taxes, and civil litigation.

Because litigation over claims concerning unpaid wages is often a costly affair, it is crucial that businesses make hiring and staffing decisions with an awareness of the potential liability inherent in designating workers as exempt employees, or as independent contractors.

Penalties for Misclassification

An estimated 3.4 million employees are classified as independent contractors when they should be reported as employees, according to 2017 data from the Department of Labor (DOL) and Internal Revenue Service (IRS). Worker misclassification penalties for employers can range from significant to severe. For clients engaged in the use of ICs, one of the most critical cost reductions in the program may come in the form of avoiding government penalties imposed after the discovery of worker misclassification. If the misclassification was unintentional, the employer faces at least the following penalties, based on the fact that all payments to misclassified independent contractors have been reclassified as wages.

Minimum Potential Tax Liabilities*	
Description	Amount
Social Security Tax (On income up to the cap, plus 2.9% of income above the cap)	15.30%
Federal Income Tax	20.00%
Unemployment Insurance	6.20%
TOTAL	41.50%
<i>*These figures represent the most basic penalties. They can run much higher.</i>	

Independent Contractor Compliance and Administration

By offering both service and software components to the program, TalentBurst supports a streamlined process to facilitate the development of a low-risk, compliant 1099 classification and engagement program. TalentBurst utilizes a combination of leading 1099 validation tools and expert oversight by our inhouse 1099 compliance expert and legal counsel. The technology includes questionnaires for both the hiring manager and independent contractor that generate real-time reports to assess the likelihood that the contractor would be considered an employee under federal and state laws. The goal is to provide clients with a defensible audit file for each independent contractor engagement, thereby avoiding the potential costs of misclassification, including fines, back pay, overtime pay, accrued benefits, and other penalties imposed. Documentation includes:

- Federal Tax ID Number
- Articles of Incorporation
- Name statement (DBA)
- Business License
- Evidence of recent clients
- Evidence of ongoing expenses
- Commercial General Liability Insurance
- W-9 form
- Consulting Services Agreement with Intellectual Property and Non-Disclosure Agreement

ASSESSING INDEPENDENT CONTRACTORS

An effective evaluation process assesses the actual business structure of the IC and focuses on determining the most appropriate worker classification. Qualifying standards evaluate the IC based on independent business history and structure, main control factors (Financial, Behavioral, and Relationship of Parties), and the IC's ability to carry the required business insurance.

As a best practice, TalentBurst serves as the responsible party overseeing compliance and determinations of employment classification, based on the **IRS 3 Factor/20 Question test**, state statutes (**ABC tests**), the **“economic realities” test of the Fair Labor Standards Act of 1938 (FLSA)**, and internal policies to differentiate independent contractors (1099s) from W2 employees. TalentBurst indemnifies clients against the risk of contracting with ICs through our subcontracting program. **To date, no IC validated by TalentBurst has been subject to an audit.**

Common Questions Included in Decision Trees

- Who will direct the work being performed?
- What type of training will be provided for the work?
- Who will supply the tools and materials to do the work?

- Is the individual available to pursue work with other organizations or clients?
- Can the individual realize a profit or incur a loss from its services?

EXPERTISE AND OVERSIGHT

Kay Ring, Vice President

Kay has been instrumental in building multiple organizations and is a recognized expert on the complexities of worker classification and 1099 validation. Kay has been honored to deliver keynote speeches for multiple events that highlight the predominant employer-employee topics in the industry, such as co-employment, exempt versus non-exempt determinations, and employment misclassification.

Inhouse Counsel

TalentBurst retains inhouse counsel to act as the final decision maker for all matters concerning labor laws, worker classification, and wage and hour rules. She works with our management team and advises them on all employment and labor laws. Through her vast understanding of the intricacies and pitfalls associated with independent contractors, she helps us adjudicate and render accurate decisions regarding the determinations between valid ICs and W2s. Based on her recommendations, we notify clients about the wisest, most risk averse decisions for moving ahead with candidate as independent contractors or placing them on TalentBurst's payroll as W2 contractors.