

FAQ: Can a U.S. Employer Hire Someone Living Abroad as an Independent Contractor?

Can a U.S. employer hire someone living abroad as an Independent Contractor?

The short answer is Yes. Being able to employ foreign talent can be transformative for a U.S. company. However, there are various legal implications and risks with cross-border relationships. Employers should engage in due diligence and have a clear understanding of what is involved and the laws affecting the employment relationship.

Disclaimer - this article is for general information purposes only, and it does not constitute legal advice. This is not our area of expertise, but I receive this question often from our clients as they are looking for options to benefit from the skills of foreign workers while the candidate awaits for the U.S. immigration process to be completed.

Thus, I have done research to help you outline some of the ways and considerations of cross-border employment relationships. You should engage in your own due diligence and obtain specialized counsel.

Main ways to hire foreign workers to work for you from abroad:

- 1- Engaging in an international business contract
- 2- Opening or having a local office
- 3- Using an Employer Of Record (EOR) services
- 4- Hiring independent contractors

1- Engaging in an international business contract

If the candidate is currently employed abroad, you can explore engaging in a short term international business contract with the candidate's employer to obtain the services of the candidate while they are abroad. When working with an international contract, you might encounter familiar contracting language and typically the contracts are written in English, which are both a plus. However, be aware that there will be differences in the way things are approached legally and business wise and there could be issues with the understanding of the meaning of certain terms.

2- Opening or having a subsidiary

With this option, your local subsidiary hires the workers as local employees. Setting up a local subsidiary is complex and has special requirements that are not feasible if needing to hire one or two workers. But, when a company plans to hire multiple workers in a particular country, opening a local subsidiary can be an efficient option to employ foreign talent.

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3- Using an Employer Of Record (EOR) services

This option involves contracting an outsourcing firm that engages in international HR services such as international payroll, benefits, tax reporting on your behalf. The employer of record (or global PEO) enters into a contractual co-employment agreement and becomes the hiring party on behalf of the company. However, the U.S. employer needs to engage in due diligence as misclassification and lack of compliance with local and/or U.S. rules can be imputed on the U.S. company.

4- Hiring Independent Contractors

This could appear to be the easiest and most viable option for short term, casual engagement and in some cases it is. However, similar to the U.S., every country has its own ways to classify what constitutes an independent contractor vs. employee.

Misclassification of employees and independent contractors can result in significant penalties and can lead to tax evasion charges and IRS audits down the road.

Below are some tips for your consideration:

Potential penalties for misclassification - U.S. employers cannot assume they can pay an individual living in another country to perform work for them in that country without a clear understanding of the rules involved. Even where self-employment is the accurate classification, taxes and fees may still be due abroad and/or in the U.S. Penalties can stack up if a U.S. company designates an international worker as an independent contractor but the local government classifies them as an employee.

Tax documentation - U.S.-based companies paying international contractors should have contractors fill out the appropriate U.S. tax documentation which formally certifies the worker's foreign status. Consulting with a U.S. and/or an international tax professional is essential. Additionally, companies may need to ensure that the contractor is properly reporting their income and tax obligations to local authorities in their host country.

Income tax reporting - These requirements need to be reviewed for every location. Many countries charge an income tax or "service fee" to be withheld by the employer and paid to the country in which the work is performed.

Employer's local presence, contractor license, or lack of "independent contractor" classification - Some countries will not allow contractors to work for employers that do not have a local presence in that country. If this requirement is not followed, employers will have engaged employees, not contractors, and may have set up business without proper filings and permits.

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Some countries require contractors to obtain a license, which can help with avoiding misclassification risks.

Some countries do not have an "independent contractor" classification. They might have different setups, such as entrepreneur, auto-entrepreneur, sole-trader, freelancer, etc. To know what is possible in the particular country, you should invest in local legal counsel that can help you determine how local laws interpret the relationship and not rely on the opinion of the foreign worker.

Requirements for classification as contractor versus employee - Many countries have considerations related to self-employed independent contractors similar to the U.S. Some of these general considerations include the following:

- Who has control over how the work is performed?
- Does the contractor have other clients and assume a risk of loss?
- Is the contractor paid for the project or hours of work?
- Are benefits given, such as vacation and sick leave?
- Do contractors make their own schedule and supply their own work location and supplies?

In sum, hiring someone living abroad as an independent contractor or as an employee is possible but comes with due diligence requirements and various complex considerations. Companies should explore this option carefully and consult with local counsel.

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