



## LNP 284

### Contractors versus Employees: What is the Difference?

Nicole Anderson

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**Kelly:** Hi, this is Kelly Campbell your cohost and we have Nicole Anderson with MEND here today. Welcome Nicole.

**Nicole:** Hi and thank you. I'm glad to be here.

**Kelly:** All right, a little bit about Nicole and her company MEND. MEND guides employers through the transition stages of the workplace, as well as through a generational workforce. We focus on helping you with your human resources, day-to-day human resources or project-based, as well as staying in compliance with state and federal regulations.

I'll tell you with tax season over, we do have some questions for you. Welcome Nicole.

**Nicole:** Thank you again for having me and I'm here to answer any questions you have.

**Kelly:** Get ready because you know when I was working with my tax guy he said, "Are you sure you were within the regulations of employer versus contractor, 1099, W-9?" All of a sudden I thought, "Oh my gosh, am I in the regulations? Did I break the laws?" Can we start from the very beginning because suddenly, I was like, "Maybe I'm not doing things right."

**Nicole:** It is very common. I get a lot of questions about having contractors versus W-2 employees and how that's going to look at income tax time. We also get, "How do I know that I am following the state laws and the federal regulations? I don't even know what those are." So, I get those questions all the time and I love sharing about contractors versus W-2s. It gives you kind of twist to your organization, "Do you hire contractors, or do you hire W-2s. Which one do you do?" I think that's important. It gives you some options as the employer.

**Kelly:** Yeah, can we start by I guess breaking it down, the 1099 contractor?

**Nicole:** So... oops, I'm sorry

**Kelly:** Yeah, no that's okay. I guarantee I'm going to talk over you because I have a lot of questions.

**Nicole:** So, the 1099 employee is not a 1099 *employee*. So, sometimes we mislabel them when we're talking about them and say, "Oh, I have a 1099 employee." There's a vast difference between a contractor at a 1099 and a W-2 employee. The first is, is that you have very limited control over your 1099 contractors as the employer, so what that means is you don't get to tell them what time they start work, how they do their job, what they use to do their job. And you don't get to tell them where they can do their job. There's a lot of control issues that come around when it comes to the contractors.

**Kelly:** Okay and when you say what to do for their job, does that mean templates and forms to use for their job? Does that mean computer programs? What exactly do you mean by what to use for their job?

**Nicole:** Contractors must supply their own tools and their own programs. You are permitted as the employer to have them use, for instance your case management system or I guess if you're in sales or some type of industry like that, your employee or your contractor can use your CRM. Whatever systems you use that way they can, but they must provide their own tools, such as pens, paper, laptops, monitors, keyboards. But, when it comes to software, they are permitted to use your software.

**Kelly:** Because that's when I got nervous when my tax guy was asking me. I'm like, "Well they do use some of my templates" and okay, good to know. Thank you for that clarification.

**Nicole:** Yes, you're safe.

**Kelly:** Okay. What are some of the benefits of hiring a contractor versus a W-2 employee?

**Nicole:** The benefit to you as an employer is taxes. When you hire a W-2 employee, you are taking on a payroll tax liability, as well as a

benefits liability if your company is big enough to require benefits for your employees. Having a contractor, you also limit your liability. You save money in three areas, worker's comp liability and general liability, taxes and benefits.

Generally, with a W-2 employee, we always up the salary by 30% because that's usually the cost of all benefits and payroll taxes put together. If somebody is making \$10,000 a year, we would add 30% on top of that and say that their actual salary is \$13,000 a year when you increase that by 30%.

With a contractor, you have none of those expenses. All of that expense is on the contractor. If you're paying them \$10,000, you're paying \$10,000.

**Kelly:** Okay, all right. Now is there a certain size company that you recommend switching over to employees versus contractors?

**Nicole:** I would not say size. I would say more industry. It would depend on your industry when it is time to switch over. For instance, in my company, we are human resources consultants, so for me to hire a contractor to work with one of my clients who we have strict confidentiality with, it wouldn't work. I have no control over a lot of the tasks and stuff that the contractor is using. However, in some lines of businesses such as manufacturing or nursing, or those industries, you can pretty much use contractors on a revolving basis as you see fit.

There are some industries that are split right down the middle. Half of their staff is contractors and half their staff are employees. It's just looking at what benefits the company monetarily and confidentiality wise.

**Kelly:** Okay, that makes sense. Have a virtual assistant, an assistant versus having contractors assist you.

**Nicole:** Yes.

**Kelly:** All right. I'm getting some good notes here, thank you.

**Nicole:** Yes, my pleasure.

**Kelly:** How much control can I have over a contractor? You had mentioned you are limited with certain contractor duties, but what can I control?

**Nicole:** You can control their client flow, how many clients they have and depending again on your industry. For instance, in real estate, most everybody who works for a real estate business, they're all contractors. They really don't control how many clients or how many deals they get per month. But in terms of case load if you're looking for nurses, how much case load can a contract nurse handle? You can put quotas in place that say that you can't exceed 10 clients a month or five clients a week, so you can control the quotas.

You can control the pay rate and you can control the hours that the company doesn't work or doesn't permit work. Let's say that you don't permit overnight work. You can say, "You know, it is part of our business model that we don't bother clients overnight, so your hours of operation have to be within the general lines of the business world."

**Kelly:** What are some of the guidelines for state and federal?

**Nicole:** What's interesting about state and federal is that... and I'll give you guys a little history on why a contractor, a 1099 contractor, has come up in conversation a lot on the news and HR.

**Kelly:** With Dynamex?

**Nicole:** Yes, HR related topics are always in the news over the last five years. There was a company in California called Dynamex and they were sued by all of their 1099 contractors, citing that Dynamex was treating them like employees but paying them like contractors. They ultimately lost in court and California started implementing new laws that protect contractors from the employer. So, let's fast-forward like three years later and Uber went into litigation, which I'm sure a lot of people have heard about this litigation.

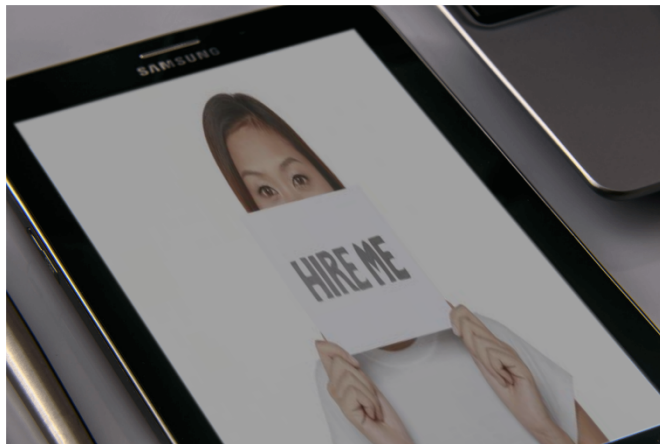
Uber, however, has been able to successfully defend in all the lower courts their contracts with their contractors. However, they've spent millions of dollars defending themselves in court over this. What has happened is California has set a precedence for the rest of the states and a lot more

states are adopting more strict guidelines about what you can ask and what you need to look for.

And, I actually have a few questions that you can ask yourself as the employer when you're looking at a contractor versus W-2. How do I know which one to go with or how...? I have a few questions you can ask yourself and these come off the litigation.

**Kelly:** Okay.

This is Pat Iyer. Before we continue, I want to share a free resource on the topic of subcontracting.



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**Nicole:** "How much control of the work is involved and who is in charge of that control?"

If you can answer that question, "What is the level of loss for every party in the relationship?"

"What are you losing having this contractor relationship and what is the contractor losing in the relationship?"

What that loss means it's not necessarily a monetary but are you working with... are you working within the bounds of the contract?

"Who pays for all supplies and materials used for work?"

"Is the worker an essential part of business?"

And, "What is the degree, if any, of permanence?" So, do you plan on keeping that person permanently or are they going to be a contractor for a while.

**Kelly:** Those are key questions.

**Nicole:** Yes, those are key questions when determining whether you fit into state guidelines. Now those are some of the strictest questions because they come straight from California, which set the precedence. Some states may not have adopted those yet, but it's better to be... to err on the side of caution and go ahead and answer those questions and then worry about it later if you're in litigation.

**Kelly:** Where did you find those questions, or can you repeat those questions just briefly because I need a repeat please.

**Nicole:** Yes, I can repeat.

**Kelly:** Summarize it quickly for...

**Nicole:** To summarize, "How much control of the work is the employer involved with and who's in charge?"

**Kelly:** Okay.

**Nicole:** "What is the level of loss for every party in the relationship?"

"Who pays for all supplies and materials used for work?"

"Is the worker an essential part of the business?"

"What is the degree, if any, of permanence?"

**Kelly:** We've got it without having to hit the rewind button.

**Nicole:** Yes, good job.

**Kelly:** What are some of the other ways to know or confirm that we're in compliance then?

**Nicole:** Confirming compliance is just going back through your contracts with your contractors and saying,

- "Do I determine this person's work hours?
- Do I determine what tools they are using?
- Do I pay for their laptop?
- Do I pay for any mileage?
- Do I pay for anything that I would not pay or that I pay for my employees?"

You can look at it as this is what I pay for my employees, do I pay my contractors anywhere near the same? If that answer is 'no', then you're more than likely in the clear. You're going to be safe. But if there's anything within those bounds that you give your employees, your W-2 employees as well, then you really need to look back through that contract and set some more strict guidelines when it comes to that. And there's one other aspect as well, is a contractor cannot be on a non-compete.

**Kelly:** Oh, that's key.

**Nicole:** That is key. So, if any of your contractors are on a non-compete, you have to remove that. It is not enforceable in court and it's binding them from doing work out, so you're trying to control the work that they do.

**Kelly:** Okay.

**Nicole:** So, confidentiality agreement and nondisclosures are completely okay, but the non-compete you cannot have any language in that contract about non-compete.

**Kelly:** Okay. Now this is a similar question that I had, so I don't mean to trick you.

**Nicole:** No.

**Kelly:** What are ways that I can ensure that the *employees*, not contractors, are in the right status? That I shouldn't have my employees as a contractor versus having a contractor as an employee, but rather making sure my employees shouldn't be a contractor.

**Nicole:** Those are actually very easy. Do you tell them that they need to be to work from 8:00 to 5:00? Do you pay them... pay their benefits? Do you pay their mileage? Do you give them a cellphone? Do you provide a laptop?

Employee classification is very simple. It's a lot simpler than the contractor classification. If you're doing any of that, then you have an employee and you must pay payroll taxes on those employees if you're controlling any of their work.

**Kelly:** Okay, I just wanted to make sure I was being economically smart but fall in the state and federal guidelines too.

**Nicole:** Oh yeah absolutely.

**Kelly:** I think I've got all my questions covered. What else do I need to do to make sure because I was making sure, like do I... am I doing my business properly? What other recommendations do you have for us?



**Nicole:** I think just the recommendation is that you know always seek someone else to look over your contracts, to make sure that you're in compliance because it always helps to have two eyes looking or a separate set of eyes looking at all of your documents. And the reason is, is you want to avoid litigation at all costs.

We actually have a figure that came out in 2017 that even if you win a lawsuit, it can cost you upwards of \$200,000 a year. It's better to try to mitigate your expenses. If all else fails, I would just move them to an employee status, to a W-2. I would. That's your safest because at that point you have control if there's confidentiality questions or... It's just safer to have them as a W-2. It may be a little bit more expensive in the beginning, but in the long run, it's going to save you a lot of money.

**Kelly:** Okay, well where do you work and how do we stay in touch and maybe have you double check so that someone is not a nervous Nellie like I was. Thank goodness I did follow the rules, but it was nerve-wracking for me I must tell you my first year. Tell us a little bit about you.

**Nicole:** I own a company called "MEND" and we are an HR solutions firm. We used to call it an HR consulting firm, but we changed that because we provide all around people solutions for companies and business owners. We do our best to custom tailor each of our solutions to our clients and some of those clients, they just hire contractors. We just make sure that they stay in compliance. And you can call us, email us, shoot us an email saying, "Hey, I heard you on Kelly's podcast and I just want to inquire..."

**Kelly:** You heard it on the podcast, yeah.

**Nicole:** Yeah.... and we just want to inquire about if we're doing this correct, what we need to do." We can review your documents just to make sure everything is okay.

**Kelly:** All right, tell us your website or your email address and...

**Nicole:** Our email or my email address is [nicole@mendingbusiness.com](mailto:nicole@mendingbusiness.com). Our website is [www.mendingbusiness.com](http://www.mendingbusiness.com) and our phone number is (561) 219-1740, and we'll be happy to take a look at documents.

**Kelly:** Avoid the stress.

**Nicole:** Avoid it. Do it now. Like if you only do it at one time, you get it now and then you don't have to worry about it. You don't have to listen to your tax guy say, "I don't think you did this right. This is what you got to pay."

**Kelly:** Yeah, you have to go back and think, "Did I, or didn't I? Did I?"

**Nicole:** Yes.

**Kelly:** Thanks so much.

**Nicole:** Thank you for having me.

**Kelly:** Tune in next week for Legal Nurse Podcast. Nicole, thanks so much.

**Nicole:** Thank you so much for having me. I appreciate it.

**Kelly:** All right, stay on. I want to chat a little bit more. I enjoyed our talk.

**Nicole:** Okay, sounds good.

I share a lot more tips about being a subcontractor and hiring subcontractors in my free training called *Get More Income with LNC Subcontracting*. Be sure to watch this online training by going to the show notes of [podcast.legalnursebusiness.com](http://podcast.legalnursebusiness.com) and click on today's episode.

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