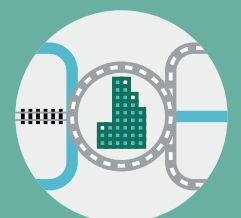


The Future of Work
Contingent workers and new employment models



Welcome to the third of Osborne Clarke's series of reports on the Future of Work. This report is based on interviews with organisations that are helping businesses deal with the rise of new employment models. They include The Curve Group, Talent Intelligence Partners, MBO Partners and Staffing Industry Analysts, as well as Osborne Clarke's experts.

This report focuses on:

- what trends we are seeing with contingent workers;
- the extent to which a sophisticated support system is evolving to reassure companies about how safe it is to use contingent workers;
- whether investment in automation will affect companies' demand for contingent workers; and
- the growing risks of using contingent workers.

The term "contingent worker" includes everyone from traditional temps and agency workers, and newer types of gig worker and zero-hours worker, through to higher-paid consultants and independent contractors.

Contingent workers accounted for **20%** of workforces in 2017. This is a significant increase on the 15% share in 2014 according to Staffing Industry Analysts research.

What trends are we seeing with contingent workers?

There is consensus among our interviewees (and many others) that the use of contingent workers has grown significantly in recent years. Statistics from a recent survey of large companies (those with more than 1,000 full-time equivalents) by Staffing Industry Analysts illustrate the extent to which their use has grown. According to their global survey, contingent workers accounted for 20% of workforces in 2017. This is a significant increase on the 15% share in 2014.

Companies are embracing contingent workers because they crave the flexibility to engage people with specific expertise to work on discrete projects for fixed periods of time, as opposed to employing them on an open-ended basis.

Flexibility is also important for individuals. Those with skillsets that are in high demand want to be able to work when they want, for whom they want and on the specific projects they are interested in. They may also want the flexibility to work on more than one project at a time. Matthew Taylor's report for the UK Government (*Employment Practices in the Modern Economy*) suggests that well over half of gig workers want to work on this flexible basis, which is why he is not recommending wholesale bans of various flexible workforce models (including zero-hours contracts).

However, media commentators are focusing hard on evidence that many workers do not have this luxury but are increasingly employed on a contingent basis because they have no alternative.

"Broadly speaking there are two camps of contingent workers," confirms Gene Zaino, President and CEO at MBO Partners. "On one side are people that offer undifferentiated services, where it's not really about their skill but more about supplementing their income. For example sharing economy drivers and cleaners fall into this category.

"The other camp includes people who have niche skills and experience. They are often highly educated and are very confident about the particular skill they have. They tend to do project-orientated work that lasts three to six months. They provide more of a strategic service to their customer rather than an undifferentiated commodity service. They usually bring in a certain expertise that is not core to the business but is necessary to build new capabilities."

These two different types of worker bring different challenges and protection issues.

The rise of the intermediary

Our interviews revealed that companies are increasingly using a number of different types of intermediary to engage with contingent workers. For some HR and procurement teams, outsourcing the management of their workforce to a managed service provider (MSP) is about efficiency and the expertise that MSPs bring, although it can also help to reduce the risks on companies, which we discuss further below, relating to misclassification of workers.



“Managed services providers (MSPs) can be useful because you might not necessarily get the best deal and the best price if you are dealing with 1000 agencies around the world. An MSP will sit between you and all of the staffing agencies you use and manage them and consolidate them and do it on your behalf so you don’t have to.”

John Nurthen, Executive Director,
Global Research, Staffing Industry Analysts

“Around ten years ago procurement teams started to get involved in staffing agency decisions so wanted more sophisticated solutions,” explained John Nurthen, Executive Director, Global Research at Staffing Industry Analysts. “This led to the development of recruitment process outsourcing, managed services and vendor management systems, which provide HR teams with a better idea of their workforce – how many temporary workers they have, how long they were engaging them for and what they were doing.

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Many employers are also starting to work with consultancies and embrace new technology to try to discover the best mix of workers, be that permanent or contingent staff, and automated technology solutions.

“Some of the bigger tech companies (and even a few smaller ones) have undoubtedly made big strides in creating more all-encompassing solutions to enable employers to source and engage with talent more effectively but total talent management is still some way off.”

Ken Brotherston, Managing Director,
Talent Intelligence Partners

“Lots of big employers talk about the utopian ideal of total talent solutions, where their internal talent pool can engage seamlessly with the external market,” explains Ken Brotherston, Managing Director at Talent Intelligence Partners. “Some of the bigger tech companies (and even a few smaller ones) have undoubtedly made big strides in creating more all-encompassing solutions to enable employers to source and engage with talent more effectively but total talent management is still some way off.

“For example, determining an organisation’s mix of permanent, contract and gig economy workers is still essentially a question of business judgement made by humans rather than decided by a technology solution.”

The impact of automation – moving people up the value chain vs job losses

Our first two future of work papers highlighted a number of investments that companies in the digital business, technology and financial services sectors have made in automating internal processes.

The general consensus from companies we interviewed in these sectors was that these investments in automation are not resulting in job losses and that instead people who were previously performing these tasks have been moved up the value chain. It is perhaps unsurprising that training and development businesses have attracted the attention of private equity investors who see this as an area where companies may make acquisitions.

“The big question is whether automation and robotics will create more jobs than they destroy. The jury is still out on this. A survey asked leading experts this question a few years ago and the results were 50:50. I think we are still there.”

John Nurthen
Executive Director, Global Research,
Staffing Industry Analysts

The intermediaries interviewed for this paper are less convinced that all affected people will be redeployed and believe that automation might result in net job losses. And it is contingent workers who are likely to lose out. “The big question is whether automation and robotics will create more jobs than they destroy,” says Nurthen. “The jury is still out on this. A survey asked leading experts this question a few years ago and the results were 50:50. I think we are still there.

“The Oxford University Frey and Osborne report a few years back concluded that 47% of US employment was at risk during the next 10-20 years. This made people pay attention all of a sudden. Using their methodology we estimated that 63% of temporary agency jobs are at risk of automation and robotics. So they are more susceptible to automation than normal jobs. And it’s not just the blue collar jobs that will be impacted but the professional classes. Of all staffing segments that we cover the one that will be impacted most is finance and accounting.”

Some growing risks with contingent workers

It is not just automation that is putting pressure on the rise of contingent workers. Our research and interviews suggest that there are some particular issues that businesses need to weigh against the benefits of using contingent workers, especially when it comes to less-skilled workers.

1. Confusion about tax and other obligations

By far the most important is the risk of 'worker misclassification' and 'co-employment' risk. These are US terms referring to the risk that authorities or employment tribunals decide that a contingent worker should actually be classified as a traditional employee, either for tax or employment law purposes. There are many reasons why this could happen. These include the extent to which they are controlled, whether they are free to send a substitute, the length of time a worker has spent at the organisation, whether they are receiving training and whether they are provided with company equipment to do their job; and whether, in fact, there is little or no practical difference between the way they are treated and the way permanent employees are treated.

"...tax and employment tribunals in countries like the UK, USA, Spain and Germany are well versed in looking behind a written contract to determine what happens in practice and what the employment status and tax status of any individual should be. Businesses need to be mindful of that and implement protective measures."

Julian Hemming, Employment Law Partner, Osborne Clarke

Julian Hemming, Employment Law Partner at Osborne Clarke, says, "Certainly tax and employment tribunals in countries like the UK, USA, Spain and Germany are well versed in looking behind a written contract to determine what happens in practice and what the employment status and tax status of any individual should be. Businesses need to be mindful of that and implement protective measures."

When it comes to tax liabilities, the consequences of misclassification can be severe, although they do vary by jurisdiction. "Companies are on pretty solid ground regarding temporary agency workers as most countries have clear regulations and most of the obligations are placed on the staffing firm," explains John Nurthen, Executive Director, Global Research at Staffing Industry Analysts. "It is much woollier when it comes to independent contractors because they often have their own limited company in countries like the UK and Germany. The key question is all about misclassification and whether they should be an independent contractor or a full time employee."

"This is a huge issue in every country but it tends to be a bigger issue in the US. People tend to think that the US is a more liberal employment market but if you are caught out in the US you won't only need to pay back all of the tax you should have paid, there is also potential for a criminal conviction and all sorts of law suits. US companies often think it will be a huge issue in Europe as it's big in the US, but it's often been seen as less of an issue in Europe."

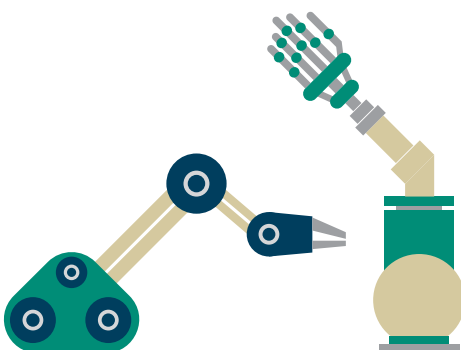
That said, governments across Europe are taking steps to prevent false self-employment. Though the extent to which they are doing so varies greatly from country to country. Jorgo Tsisris, an employment Partner in Osborne Clarke's Amsterdam office, comments: "The Dutch Government – like any EU member state – is struggling with the growth of self-employment but its thinking is less developed than the US and other European markets."

"...it is important companies operating in Europe ensure their contingent workforce arrangements comply with the different rules across the continent."

Jorgo Tsisris, Employment Partner, Osborne Clarke Amsterdam

In October 2017, the new Dutch cabinet announced it will withdraw the Employment Relationships (Deregulation) Act, which was intended to crack down on the perceived growth in false self-employment, and revert back to its former 'labour relationship statement' (VAR) model. "While some may perceive this as a step backwards, the revised VAR model will include some significant revisions, including a minimum fee for low skilled workers, and service fees and a possible opt-out system for highly skilled workers. This shows that the Government is taking steps to tackle the issue but it is important companies operating in Europe ensure their contingent workforce arrangements comply with the different rules across the continent."

Tax authorities are also stepping up efforts to recover what they see as lost revenues from false self-employment. For example, the UK tax authorities have become more vigorous in their enforcement of National Minimum Wage contributions and have ever greater powers under various new measures forming part of the Intermediaries Legislation (including IR35) and the Criminal Finances Act. Companies at risk can face fines, the requirement to backdate certain payments (e.g. holiday and sick pay) to workers and/or civil or criminal liability.



2. Employment claims

As well as pressure from tax authorities, there have been a series of high-profile employment cases in the last twelve months in which workers at the likes of Uber, Addison Lee and CitySprint have successfully argued that they should be classified as workers or employees rather than self-employed, and so entitled to benefits that employees receive, such as holiday pay and sick pay. There have been similar findings in the US in cases involving Uber, Lyft and drivers for logistics companies. While some of these cases are being appealed to the higher courts, the direction of travel seems pretty clear. And there is focus on similar issues in France, Germany and other European countries.

Other organisations with many contingent workers could well face employment tribunal claims or litigation, especially because the ease of workers bringing claims is increasing. In July 2017 the UK Supreme Court ruled that fees associated with bringing Employment Tribunal and Employment Appeal Tribunal cases prevent access to justice and are unlawful. This is expected to result in a large rise in the number of employment claims being brought across the board in the UK.

Companies with many contingent workers may, therefore, need to reassess their employment strategy in order to avoid the costs of employment claims and the associated reputational damage.

3. Improving quality and the customer experience

There are some concerns about how the use of contingent workers may affect quality, as the inability to directly control how self-employed contingent workers do their work can result in poor customer service. Lyndsey Simpson, CEO of The Curve Group, provides an example.

"A plumbing company is a classic example where this issue arises," she says. "Someone might phone a plumbing company because they have a burst pipe. The company will then send a self-employed plumber to arrive at 4 pm. But if that plumber doesn't turn up the company will get a complaint call at 5.30 pm. The plumber might say that their previous job ran over and that they will go to that client the next day.

"Many companies that value their reputation and want to reduce customer complaints are reducing self-employed workers so that they can better control them."

Lyndsey Simpson
CEO of The Curve Group

"In this case there is nothing that the company can do. They can't do anything to exert control over their self-employed workers as if they did they would be deemed a proper employee. Many companies that value their reputation and want to reduce customer complaints are reducing self-employed workers so that they can better control them."

This can be a particular issue in highly regulated sectors. Regulators in certain sectors are exerting pressure on companies not to use contingent workers in any client-facing or very sensitive role, although this pressure varies across European regulators. To date this has primarily impacted the "approved persons regime" in the financial services sector, where there is a lot of focus to stay on top of (and be seen to stay on top of) compliance issues following mis-selling scandals and the financial crisis.

When considering quality issues, companies must also consider the extent to which training is important. This is because providing training is one factor that tribunals or authorities may take into account in determining whether a person is, in reality, employed by the company. The benefits of using contingent staff, therefore, need to be weighed up against the impact on quality of not being able to train and control workers.

"What is interesting is how traditional staffing companies are in many cases evolving into outsourcing companies and taking much more responsibility for the output of the workers. This gives end users reassurance about quality, can preserve some of the tax efficiency of using contingent workers and ensures that end users retain a flexible workforce where needed."

Kevin Barrow, contingent workforce expert,
Osborne Clarke

Osborne Clarke contingent workforce expert Kevin Barrow explains how some companies are dealing with this issue. "Many businesses do not want more 'permanent' staff on payroll, so there is a trend towards outsourcing to a separate entity, which takes responsibility for training, employing and paying relevant workers, probably on an employed basis. This has been happening in non-core areas like cleaning and hospitality for years, but there has been an increase recently as directly engaged self-employed options have declined because of rising concerns about tax and various other risks. What is interesting is how traditional staffing companies are in many cases evolving into outsourcing companies and taking much more responsibility for the output of the workers. This gives end users reassurance about quality, can preserve some of the tax efficiency of using contingent workers and ensures that end users retain a flexible workforce where needed.



"Companies are also looking hard at what roles they really need to control and which they don't, i.e. situations where they don't care about how the work is done providing the output meets the required standard. Those types of role still lend themselves to self-employed contingent working solutions and the increasing use of crowd-sourcing and home-working models may actually increase the number of roles where self-employment is viable."

4. Retaining intellectual capital

For a number of years companies have used specialist contingent workers to run transformational projects. These might relate to regulatory compliance or a digital initiative. However, companies are becoming increasingly concerned that these individuals might develop a similar project at a competitor once their engagement is complete. Of course this risk applies even where 'employees' are used on sensitive projects, but the perception at some companies seems to be that the risks are higher when it comes to short-term contingent workers.

"...a lot of the normal legal protections employers rely on in relation to their employees (relating to confidentiality and fiduciary duties) do not automatically apply to contingent workers, which means that carefully drafted express contractual protections will be needed."

Thomas Leister, German flexible workforce specialist, Osborne Clarke

Companies need to keep this in mind when determining their workforce strategy and, if contingent workers are to be used, ensure that adequate contractual protections are in place. "Companies must bear in mind that a lot of the normal legal protections employers rely on in relation to their employees (relating to confidentiality and fiduciary duties) do not automatically apply to contingent workers, which means that carefully drafted express contractual protections will be needed," explains German flexible workforce specialist Thomas Leister of Osborne Clarke.

Balancing the use of contingent workers with your employer obligations

Companies across multiple sectors have ramped up their use of contingent workers in the last decade. But has a tipping point been reached in at least some areas? On the one hand, employers crave the commercial flexibility that using contingent workers affords. Some workers, especially those brought in to run business-critical projects, only want to work on a contingent basis.

But, on the other hand, the regulatory environment is becoming tighter. In particular, some European employers are considering the use of fewer contingent workers because they don't want to fall foul of legislation governing false self-employment. For this reason, many businesses are sourcing contingent workers through intermediaries that manage these risks.

To complicate matters, these trends are not playing out in isolation. Companies are increasingly investing in automation. Some businesses may have less of a need for contingent workers (particularly for low-skilled roles) because internal business processes are now automated.

So what is this going to mean for the use of contingent workers?

What is clear is that there is no one factor that is going to lead inexorably to an increase or decrease in the use of contingent workers in society in general. For each business, whether its use of contingent workers will increase or decrease will largely depend on the extent to which the risk factors discussed above outweigh the benefits to its business.

Importantly, many of these factors will impact the use of lower-skilled contingent workers more than more highly skilled workers, where the benefits of using contingent workers are more likely to outweigh the risks of doing so. It is, therefore, sensible to predict that the use of highly skilled contingent workers will continue to increase, but there are more questions about whether the use of lower-skilled contingent workers – for example, those in the so-called gig economy – will continue to grow.



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- John Nurthen, Executive Director, Global Research at Staffing Industry Analysts (an international research organisation specialising in the use of new employment models)
- Lyndsey Simpson, CEO of The Curve Group (an HR consultancy and recruitment process outsourcing company)
- Gene Zaino, President and CEO of MBO Partners (an international provider of support services relating to self-employed workers)

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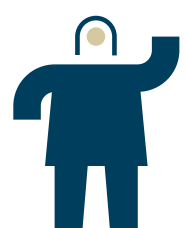
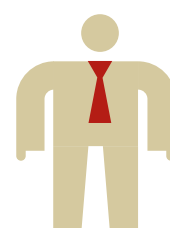
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