
Future Work: Protecting information assets in the gig economy

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In brief

Technology and changing barriers to skilled migration are making remote freelance work models increasingly attractive. Many businesses are now contracting directly with just-in-time, online workers as we shift to an ever-expanding information economy. For information-rich organisations, the capacity to keep control and ownership of proprietary information should be a key focus when engaging remote contingent workers. We consider how businesses can best protect proprietary information while enjoying the benefits of a diverse freelancer network.

In detail

When organisations get the fundamentals of the relationship correct, remote contract workers can open the door to greater flexibility and a more diverse talent pool when compared to the traditional employment model. Of course, any change in approach brings with it both opportunity and risk. For information-rich organisations, the capacity to keep control and ownership of proprietary information should be a key focus when engaging remote contingent workers. This is where many of the automatic legal protections that arise in the context of an employment relationship do not exist in a contractor relationship.

Organisations must be careful not to assume that all ‘workers’ are alike when it comes to common legal protections over proprietary information. Implied and legislative employee obligations create a base layer of protection for an employer’s business regardless of what an employer may ultimately think to include in an employment contract. In contrast, these significant protections do not arise automatically in contractor relationships. This makes contracting important when it comes to engaging contractors.

So who owns what in a contractor, as opposed to employment relationship?

Courts recognise that employees owe obligations of confidentiality to their employers, regardless of what might be contained in a written contract of employment. Employees have an implied obligation of confidence, prohibiting the use or disclosure of an employer’s confidential information other than in connection with the employee’s authorised duties and employment.

Contractors do not have the same, automatic obligation. Courts may imply obligations of confidentiality, depending upon the underlying arrangements between a principal organisation and its contractors. However, this is not guaranteed.

There are also certain automatic presumptions employer ownership over intellectual property rights in work created by employees during employment. For example, the *Copyright Act 1968 (Cth)* contains a general statutory presumption that an employer will own the copyright in works created by an employer in the course of his or her employment (except in some limited occupations). Similar presumptions arise at common law in relation to patent rights in works created in connection with employment.

Where a worker is engaged as a contractor, the worker will generally own intellectual property rights in works created (with some limited protection over copyright in works created under a contract for services). Although, the contractor may agree to assign these rights, or grant a licence to the engaging organisation to use the works.

Mixing it up – use of existing proprietary information to perform contract services

Where the engaging organisation has provided its own proprietary information to a contractor in order for the contractor to develop further work, this may also amount to a licence for the contractor to use the material to develop unique works.

In a worst-case-scenario, if the engaging organisation has failed to set clear limits on how its proprietary information may be used, and to obtain express rights over the contractor's work product, then the organisation may both lose control over its own information and have no clear right to use work produced by a contractor for the organisation.

Best practice contracting principles

Core protection terms: When engaging contract workers, organisations must be careful to enter into written agreements, and include terms that address:

- any limits on the contractor's rights to access and use the organisation's confidential information and intellectual property, including in performing contracted services;
- the organisation's rights in, or to use work created by the contractor during the engagement, including in developing further works independently of the contractor, and in relation to the contractor's moral rights; and
- limits or prohibitions on the contractor's future use of work created during the engagement.

Restraints and exclusivity: Organisations should also consider the extent to which non-solicitation/non-competition should be addressed. It may be difficult to enforce these types of restrictions against contractors, as opposed to employees, given the commercial nature of a contingent contractor relationship. In addition, including exclusivity clauses in contractor agreements may give rise to an employment relationship, and risk of reclassification claims (see our recent LegalTalk Alert, [*Future Work: Are your gig workers contractors or employees?*](#)). Given these issues, organisations should be careful about the types of proprietary information and commercial relationships to which freelancers are given access. This is particularly where remote freelancers may be simultaneously performing similar work for other organisations, including competitors.

Consider who is giving the protection: Persons performing work, as well as any contracting entity (for example, where an individual uses a corporate entity for engagement purposes, or where they are hired through a third party agency) should be required to comply with business protection provisions. If the relevant contract is with a corporate entity, that contracting entity should be required to give protective covenants, and also to have its workers give the same covenants in favour of the engaging organisation. If sub-contracting to other workers is not allowed, this should be stated.

Consider where the protections might need to be enforced: Organisations must carefully consider where they may need to enforce contractual obligations in both determining the governing law of their contracts, but also the locations from which they will engage contract workers who are able to perform services remotely. Courts in some jurisdictions will not necessarily enforce business protection obligations.

Capture what needs to be protected: Organisations should also be careful to ensure that a contractor's obligations are owed not only to the organisation itself, but also to group members. This is particularly where the engaging organisation is not the entity in a corporate group that holds relevant intellectual property rights.

The takeaway

Remote, contingent workers provide a useful resource for businesses, and their utility is likely to increase as remote working technology evolves. Businesses need to be mindful of protecting proprietary information, including by:

1. *Avoiding assumptions that employees and contractors are alike in obligations owed over proprietary information;*
2. *Adequately addressing business protections in written contracts; and*
3. *Carefully considering what information needs to be protected, who should be giving promises about business protection obligations, and where those obligations may need to be enforced.*

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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