



“Because the potential liabilities and penalties are significant if an individual is treated as an independent contractor and later found to be an employee, each working relationship should be thoroughly researched and analyzed before it is established.”

Individuals who are independent contractors are not “employees” for state or federal wage and hour purposes. Thus, these individuals are not subject to minimum wage, overtime pay or other protections under those laws. Frequently employers mischaracterize an individual as an independent contractor, rather than as an employee, subjecting their company to legal consequences, including but not limited to unpaid withholding taxes, workers compensation insurance premiums and unpaid overtime wages. Governmental agencies such as the EDD and the IRS have been evaluating and attacking businesses that misclassify these workers, and when an impropriety has been discovered, assessing fines for unpaid back payroll taxes, unpaid wages and other benefits, penalties, interest and criminal penalties. Additionally, direct recourse by the worker against the employer is possible.

In general, “independent contractors” are independently established entities providing specialized services on a limited basis. Since there is no single legal definition for the term “independent contractor”, guidance is commonly gleaned from interpretations by enforcement agencies and courts. Typically, courts and governmental authorities will apply the general common law on agency in determining whether an individual is an employee or independent contractor. Depending on the particular area of the law under which the analysis is being made, whether an individual is an employee or independent contractor can vary. California Labor Code defines an independent contractor as an individual who is under the control of a principal as to the results only and not the means of accomplishing the results. *Labor Code section 3353*. This is consistent with the interpretations which hold that the most significant factor is the degree of control exercised over the individual hired to perform the work.

An agreement may reveal the parties’ intention as to the nature of the relationship between the parties. However, calling a worker an independent contractor will not make him so. Issuing a 1099 form won’t do the trick either. Even a written agreement with the worker will not alone suffice. All facts and circumstances must be evaluated to determine the relationship.

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California law *presumes* that a worker is an employee, not an independent contractor. The hiring business may rebut the presumption by sufficient evidence that the worker is independent under the criteria referenced. The following factors are usually considered and should be satisfied to properly treat an individual worker as an independent contractor:

The contractor should not:

- be required to follow instructions or directions of hiring entity;
- receive training from the hiring company;
- be required to perform the work personally;
- perform a service that is part of the regular business of the hiring entity;
- be included on payroll and have tax deductions withheld;
- receive employee type benefits;
- perform a service that is not essential to the hiring entity;
- be required to attend meetings of the hiring entity or submit interim reports to hiring entity;
- be terminated at will;
- have a permanent relationship with the hiring entity.

The contractor should:

- perform work requiring special skills;
- have a separate occupation/business with ability to work for multiple entities doing the same type of specialized work;
- set his or her own schedule;
- hire, fire and pay his or her own employees or assistants;
- have sufficient time to perform the services for others;
- control the manner and means of performance;
- be able to set priorities and the sequence of the work to be provided to the hiring entity;
- be paid by the job rather than time typically;
- have risk of financial loss due to significant investment in work;
- provide his or her own tools, equipment and place of work;
- pay his or her own business expenses (e.g. hire own employees, invest in equipment/tools);
- maintain an independent economic interest in work performed other than simply increase in his or her own pay;
- risk profit and loss;
- maintain temporary working relationship on specific projects.

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No one factor is decisive. Additionally, in California, if any person performs a service, which requires a license, that person must hold that required valid California license. Without the license, that worker and all of the employees of the worker become your employees.

The Division of Labor Standards and Enforcement lacks the authority to accept claims of independent contractors. Whether the employees of the independent contractors are employees of the hiring entity depends on the degree of control/supervision, if any, the hiring entity exercises over such individuals.

The manner in which entities typically get caught for mislabeling independent contractors is when the worker gets injured and files for state disability benefits. Another way is if the workers files for unemployment at the end of the period of work, the EDD would not have a record of the entity paying payroll taxes on the worker. Another risk is that a disgruntled worker files a claim with the DLSE seeking payment of unpaid overtime. The Department of Labor and IRS audits where 1099s are examined, can also reveal this error.

Do not be one of the business caught improperly classifying your workers and be penalized for your mistake! Conduct a self-audit using the above criteria, or other resources available to companies to make this determination.

Additional Resources

Federal law status: <http://www.irs.ustreas.gov> (key search term “independent contractor.)

State law status: <http://www.edd.cahwnet.gov> (key search term “independent contractor.)

About Elizabeth J. Koumas, Esq.

Ms. Koumas is the founder of the law firm Koumas Law Group. She has extensive experience in labor law compliance and employment litigation. Her practice focuses on the defense of employers in administrative claims filed with the Labor Commissioner, the Department of Fair Employment and Housing (DFEH), the Equal Employment Opportunity Commission (EEOC), and the Employment Development (EDD). She also represents the interests of employers and management in litigated matters, which include wage and hour issues, wrongful termination, sexual harassment and discrimination claims. For more information about Ms. Koumas or the services that can be provided, please visit www.KoumasLaw.com.