

Is Your Independent Contractor Really An Employee?

Employers often unintentionally misclassify workers as independent contractors when they should really be employees. This common error can lead to serious consequences, including audits, lawsuits, and liability. Accordingly, all employers should conduct a careful review of their independent contractor relationships to determine if they are valid and proper.

Statutory Definition

California Law states that a worker may be considered an independent contractor if (1) the worker has the right to control the performance of services, (2) the result of the work is the primary factor bargained for, and not the means by which it is accomplished, (3) the worker has an independently established business, and (4) the worker's independent contractor status is not a subterfuge to avoid employee status.

The law further states that independent contractor status is evidenced if the worker: (1) has a substantial investment in the business other than personal services, (2) purports to be in business for himself or herself, (3) receives compensation by project rather than by time, (4) has control over the time and place the work is performed, (5) supplies the tools used in the work, (6) hires his or her own employees, (7) performs work that is not ordinarily in the course of the employer's work, (8) performs work that requires a particular skill, (9) holds a business license, (10) intends to establish an independent contractor relationship, and (11) agrees that the relationship is not terminable at will.

Independent Contractor Agreements

The first step an employer should take to define the relationship is to have the parties execute a well-written independent contractor agreement. This agreement should state that the employer is only interested in the results to be achieved, and that the manner and method of accomplishing the results are left to the control of the independent contractor. However, the mere existence of an independent contractor agreement alone will not compel a court or agency to conclude that an independent contractor relationship exists. Instead, all of the relevant factors must be reviewed before any decisions are made.

Independent Contractor Checklist

In order to determine whether or not a worker can be classified as an independent contractor, the employer should carefully review the following checklist. The greater the number of "yes" responses to the questions set forth below, the greater the likelihood that the worker may be considered an independent contractor.

Intent of the Parties: Did the parties clearly intend to create an independent contractor relationship? Is there a written independent contract agreement signed by both parties? Do the parties not have the right to terminate the relationship at will?

Right to Control: Does the employer have little or no control over the worker? Does the worker have the right to control the manner and means of accomplishing the results desired? Does the worker use his or her own initiative and judgment when performing the services? Is the worker not supervised by the employer?

Separate Business: Does the worker hold himself or herself out as an independent contractor instead of an employee? Is the worker engaged in a separately established business distinct from that of the employer? Does the worker perform services for other entities besides the employer? **Other Employees:** Does the worker performing the services have the right to hire and terminate employees working for him or her? Does the employer not have the ability to hire or fire the employees of the worker? Does the worker have no authority to supervise employees of the company?

Specialized Services: Does the worker provide specialized services that no other employee of the employer can perform? Is the worker providing services that require a great deal of skill? Is the work being performed by the worker not part of the regular business of the employer? Does the worker have a work-related license, degree, or certificate?

Services Performed: Does the work have a set time period in which it must be completed? Is the length of time for which the worker is to perform the services short? Does the worker provide the tools, instrumentalities, and supplies to perform the work? Does the worker provide services at a location other than at the employer's premises? Does the worker come onto the employer's premises on an infrequent basis, or not at all?

Payment for Services: Is the method of payment by the job instead of by the hour? Is the worker being paid a high rate for his or her services? Does the employer issue invoices for the worker's services? Are the payments to the worker charged to accounts other than the employer's labor and salary accounts? Is the worker not listed on the employer's payroll? Does the employer not withhold taxes from payments to the worker? Does the employer issue a 1099 form for the services provided by the worker?

Note: It is important to remember that no single factor is determinative. Instead, the employer must consider all of these factors when making this crucial decision.

Penalties for Misclassifying Workers

The penalties for misclassifying an employee as an independent contractor can be quite severe. They may include an intrusive government audit, which frequently leads to the employer having to pay back taxes and fines to the government. Also, workers who were misclassified as independent contractors may bring civil lawsuits to recover lost wages and benefits from the employer, and may even recover their attorneys fees and costs of suit. Also, there has been a recent trend towards class action lawsuits against employers in this area, which can be quite expensive to defend.

Conclusion

Due to the legal complexities concerning the classification of workers as either independent contractors or employees, employers may want to have experienced labor counsel assist them in their review of this important issue.

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Attorneys

Greg S. Labate

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