

# Workforce Classification in California

By Jeffrey Wertheimer and Brandon Sylvia

**A common cost-cutting** expedient for small businesses is outsourcing work to independent contractors. But the distinction between an independent contractor and an employee is frequently blurred and muddled by misconceptions.

Employees and independent contractors are entitled to fundamentally different rights under California law. An independent contractor is not entitled to protection under wage and hour laws, which encompass minimum wage, overtime, meal and rest breaks, vacation pay, sick time and reimbursement of work-related expenses. Companies need not provide workers' compensation insurance for independent contractors, nor are independent contractors protected by many state and federal anti-discrimination laws.

However, potentially severe liabilities can be imposed for improper classification, with workers themselves having to be compensated for violation of wage and hour laws. In addition, various government agencies, including the IRS, the state Division of Labor Standards Enforcement and the California Employment Development Department (which administers state unemployment and disability programs) may come after the company. Finally, the district attorney's office can bring criminal charges for violation of the Workers' Compensation Act.

The fact that an individual wants to be treated as an independent contractor doesn't mean he or she will be one in the eyes of the law. Classification is a legal determination that can-

not be superseded by the understanding of one or both parties. It is no defense that the worker has signed a contract agreeing to act as an independent contractor. Such private agreements may be relevant, but cannot protect a business from exposure.

A worker who only performs tasks occasionally, or on an on-call basis, is not necessarily an independent contractor. Nor is it of consequence that a worker performs assignments for more than one company. While such circumstances may be relevant to determining proper classification, neither is determinative.

Some businesses have made the mistake of classifying an individual as an independent contractor either because the person was compensated on commission or because the person was provided with a 1099 tax form. Employees and independent contractors alike may be paid on an hourly, commission, or piece-rate basis, and tax treatment depends on proper classification status, not vice-versa.

Historically, the distinction between employees and independent contractors was developed in order to limit an employer's liability for injuries caused by hired help. In recognition of this, the common law "control test" arose. The test is based on the premise that if an employer controls certain aspects of an individual's working conditions, that individual is an employee and not an independent contractor.

An employer is presumptively responsible for the acts of an employee, but not those of an independent contractor. The

crucial inquiry is whether or not the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.

In other words, if the worker is responsible for controlling the particulars of the work, the means to whatever end is pursued, then the worker is likely an independent contractor. On the other hand, if the company has pervasive control — for example, if the business is entitled to give specific directions that it expects to be followed, or if the company can discharge the worker at any time with impunity — then the control test would likely support a finding that the worker is an employee.

Unfortunately, the simple control test has been modified a number of times over the years in order to remain relevant to the limitless varieties of business relationships in the modern workplace. The right to control still remains the principal inquiry, but various other factors must now be considered. Precisely which are relevant, and the weight attributed to each, is a complex inquiry

California case law has augmented the basic common-law control test with additional factors to be considered. These include the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work; the method of payment, whether by time or by job; whether or not the work is a part of the regular business of the principal; and whether or not the parties believe they are creating the relationship of employer-employee.

## EMPLOYEES AND INDEPENDENT CONTRACTORS ARE ENTITLED TO FUNDAMENTALLY DIFFERENT SETS OF RIGHTS UNDER CALIFORNIA LAW.

Both the courts and the California Labor Code have expressed a strong preference towards finding an employee-employer relationship.

A written agreement between employers and independent contractors is advisable. Careful drafting of such an agreement can strengthen the company's defenses. There are no magic words, but there are terms to which courts have traditionally attributed particular meaning in the context of employee classification.

"Company" and "business" are neutral terms describing an entity for whom someone is performing services. Neither term

indicates whether the entity is an employer, on the one hand, or a recipient of contracted services, on the other. "Worker" and "service provider" are neutral terms describing an individual performing services generally — an independent contractor,

## THE FACT THAT AN INDIVIDUAL WANTS TO BE TREATED AS AN INDEPENDENT CONTRACTOR DOESN'T MEAN HE OR SHE WILL BE ONE IN THE EYES OF THE LAW.

not an employee. "Contract for" and "retain" are often used to describe the establishment of an independent contractor relationship, while "hire" tends to describe the establishment of an employer-employee relationship.

"Customer" and "client" describe the user of the services that an independent contractor provides. "Employee" and "employer" describe the parties in an acknowledged employment relationship, while "contractor" and "consultant" are often used to refer to an independent contractor.

There is a great deal of information on this topic available via the internet, but not all of it is accurate. The California Division of Labor Standards Enforcement is a good source of information, and the IRS maintains a series of informative web pages covering the topic of independent contractors.



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