

Independent contractor versus employee

Not all workers are employees as they may be volunteers or independent contractors. Employers oftentimes improperly classify their employees as independent contractors so that they, the employer, do not have to pay payroll taxes, the minimum wage or overtime, comply with other wage and hour law requirements such as providing meal periods and rest breaks, or reimburse their workers for business expenses incurred in performing their jobs. Additionally, employers do not have to cover independent contractors under workers' compensation insurance, and are not liable for payments under unemployment insurance, disability insurance, or social security.

The state agencies most involved with the determination of independent contractor status are the Employment Development Department (EDD), which is concerned with employment-related taxes, and the Division of Labor Standards Enforcement (DLSE), which is concerned with whether the wage, hour and workers' compensation insurance laws apply. There are other agencies, such as the Franchise Tax Board (FTB), Division of Workers' Compensation (DWC), and the Contractors State Licensing Board (CSLB), that also have regulations or requirements concerning independent contractors. Since different laws may be involved in a particular situation such as a termination of employment, it is possible that the same individual may be considered an employee for purposes of one law and an independent contractor under another law. 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.

There is a rebuttable presumption that where a worker performs services that require a license pursuant to [Business and Professions Code Section 7000, et seq.](#), or performs services for a person who is required to obtain such a license, the worker is an employee and not an independent contractor. [Labor Code Section 2750.5](#)

1. Q. How do I know if I am an employee or an independent contractor?

A. There is no set definition of the term "independent contractor" and as such, one must look to the interpretations of the courts and enforcement agencies to decide if in a particular situation a worker is an employee or independent contractor. In handling a matter where employment status is an issue, that is, employee or independent contractor, DLSE starts with the presumption that the worker is an employee. [Labor Code Section 3357](#). This is a rebuttable presumption however, and the actual determination of whether a worker is an employee or independent contractor depends upon a number of factors, all of which must be considered, and none of which is controlling by itself. Consequently, it is necessary to closely examine the facts of each service relationship and then apply the law to those facts. For most matters before the Division of Labor Standards Enforcement (DLSE), depending on the remedial nature of the legislation at issue, this means applying the "multi-factor" or the "economic realities" test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341. In applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. Additional factors that may be considered depending on the issue involved are:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;

4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
5. Whether the service rendered requires a special skill;
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job; and
11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

Even where there is an absence of control over work details, an employer-employee relationship will be found if (1) the principal retains pervasive control over the operation as a whole, (2) the worker's duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary. (*Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288)

Other points to remember in determining whether a worker is an employee or independent contractor are that the existence of a written agreement purporting to establish an independent contractor relationship is not determinative (*Borello, Id.* at 349), and the fact that a worker is issued a 1099 form rather than a W-2 form is also not determinative with respect to independent contractor status. (*Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, 877)

2. **Q. The person I work for tells me that I am an independent contractor and not an employee. He does not make any payroll deductions or withholdings for taxes, social security, etc., when he pays me, and at the end of the year he provides me with an IRS form 1099 rather than a W-2. By paying me in this manner does it mean I am automatically an independent contractor?**
 - A. No. The fact that a person who provides services is paid as an independent contractor, that is, without payroll deductions and with income reported by an IRS form 1099 rather than a W-2, is of no significance whatsoever in determining employment status. Your employer cannot change your status from that of an employee to one of an independent contractor by illegally requiring you to assume a burden that the law imposes directly on the employer, that being, withholding payroll taxes and reporting such withholdings to the taxing authorities.
3. **Q. Does it make any difference if I am an employee rather than an independent contractor?**
 - A. Yes, it does make a difference if you are an employee rather than an independent contractor. California's wage and hour laws (e.g., minimum wage, overtime, meal periods and rest breaks, etc.), and anti-discrimination and retaliation laws protect employees, but not independent contractors. Additionally, employees can go to state agencies such as DLSE to seek enforcement of the law, whereas independent contractors must go to court to settle their disputes or enforce other rights under their contracts.

4. **Q. When I started my current job my employer had me sign an agreement stating that I am an independent contractor and not an employee. Does this mean I am an independent contractor?**
- A. No. The existence of a written agreement purporting to establish an independent contractor relationship is not determinative. The Labor Commissioner and courts will look behind any such agreement in order to examine the facts that characterize the parties' actual relationship and make their determination as to employment status based upon their analysis of such facts and application of the appropriate law.
5. **Q. How can it be that the Labor Commissioner determined I was an employee with respect to a wage claim I filed and won, and the Employment Development Department (EDD) determined I was an independent contractor, and denied my claim for unemployment insurance benefits?**
- A. There is no set definition of the term "independent contractor" for all purposes, and the issue of whether a worker is an employee or independent contractor depends upon the particular area of law to be applied. For example, in a wage claim where employment status is an issue, DLSE will often use the five-prong economic realities test to decide the issue. However, in a separate matter before a different state agency with the same parties and same facts, and employment status again being an issue, that agency may be required to use a different test, for example, the "control test," which may result in a different determination. Thus, it is possible that the same individual will be considered an employee for purposes of one law and an independent contractor under another.
6. **Q. What can I do if I believe my employer has misclassified me as an independent contractor and as a result am not being paid any overtime?**
- A. You can either [file a wage claim](#) with the Division of Labor Standards Enforcement (the Labor Commissioner's Office), or you can file an action in court to recover the lost overtime premiums. In both situations, it will first be necessary to determine your employment status, that is, employee or independent contractor, before the issue of overtime can be addressed and decided. Additionally, if it is determined that you are an employee and you no longer work for this employer, you can make a claim for the waiting time penalty pursuant to [Labor Code Section 203](#). Eligibility for this penalty is dependent upon your employment status, as independent contractors are ineligible for the waiting time penalty.
7. **Q. What is the procedure that is followed after I file a wage claim?**
- A. After your claim is completed and filed with a local office of the Division of Labor Standards Enforcement (DLSE), it will be assigned to a Deputy Labor Commissioner who will determine, based upon the circumstances of the claim and information presented, how best to proceed. Initial action taken regarding the claim can be referral to a conference or hearing, or dismissal of the claim.
- If the decision is to hold a conference, the parties will be notified by mail of the date, time and place of the conference. The purpose of the conference is to determine the validity of the claim, and to see if the matter can be resolved without a hearing. If the claim is not resolved at the conference, the next step usually is to refer the matter to a hearing or dismiss it for lack of evidence.
- At the hearing the parties and witnesses testify under oath, and the proceeding is recorded. After the hearing, an Order, Decision, or Award (ODA) of the Labor Commissioner will be served on the parties.

Either party may appeal the ODA to a civil court of competent jurisdiction. The court will set the matter for trial, with each party having the opportunity to present evidence and witnesses. The evidence and testimony presented at the Labor Commissioner's hearing will not be the basis for the court's decision. In the case of an appeal by the employer, DLSE may represent an employee who is financially unable to afford counsel in the court proceeding.

See the [Policies and Procedures of Wage Claim Processing](#) pamphlet for more detail on the wage claim process procedure.

- 8. Q. What can I do if I prevail at the hearing and the employer doesn't pay or appeal the Order, Decision, or Award?**
- A.** When the Order, Decision, or Award (ODA) is in the employee's favor and there is no appeal, and the employer does not pay the ODA, the Division of Labor Standards Enforcement (DLSE) will have the court enter the ODA as a judgment against the employer. This judgment has the same force and effect as any other money judgment entered by the court. Consequently, you may either try to collect the judgment yourself or you can assign it to DLSE.
- 9. Q. What can I do if my employer retaliates against me because I thought I was misclassified as an independent contractor and objected to not being paid overtime?**
- A.** If you are an employee and your employer discriminates or retaliates against you in any manner whatsoever, for example, he discharges you because you question him about your employment status, or about not being paid overtime, or because you file a claim or threaten to file a claim with the Labor Commissioner, you can [file a discrimination/retaliation complaint](#) with the Labor Commissioner's Office. In the alternative, you can file an action in court against your employer. If, on the other hand it is determined that you are in fact an independent contractor, DLSE cannot assist you as it does not have jurisdiction over independent contractors, and you would have to go to court to enforce your rights.